United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

945

BRIEF FOR APPELLANTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21097

H. MAX AMMERMAN, *et al.*,

Appellants,

—v.—

CITY STORES COMPANY,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

The principal questions presented are:

1. Whether an alleged oral contract, which could bind the builders of a major shopping center to erect at their own expense a multimillion dollar building for long-term leasing to the plaintiff, is proved by "clear and convincing" evidence when: a) the defendants deny the contract, b) there is no documentary proof of the contract, c) the plaintiff's sole witness to the alleged conversation admits that he does not remember it but only assumes that the conversation occurred, and d) the alleged consideration was nothing more than a one-page letter, for possible use in a zoning proceeding?

2. Whether an "assurance" to give a department store "the opportunity to become one of our contemplated center's major tenants with rental and terms at least equal to that of any other major department store in the center" is an option for a lease?

3. Whether an undated letter, which plaintiff claims was intended to be an "Option for a Lease" on a multimillion dollar building, and which plaintiff claims was given pursuant to a prior oral contract to exchange such an option for a letter to be used in a zoning proceeding, furnishes reliable proof of such a transaction within the meaning of the Statute of Frauds, when the undated letter does not state that it is an option, or that it is being given for consideration, or that it is being given pursuant to some contractual arrangement between the parties, and when the alleged oral contract itself must be relied on for proof that the undated letter is a memorandum of that oral contract?

4. Whether an alleged option agreement which omits substantial terms left open for future negotiation is immune from the rule that agreements to be specifically enforceable must be complete as to all material terms?

5. Whether a court, after finding that an alleged construction contract left substantial terms pertaining to the design, cost and construction of the building open for future negotiation, may nevertheless order the builder on pain of contempt not only to negotiate but to agree with the tenant on such substantial terms?

6. Whether a court can or should exercise equitable powers to enforce a contract where a) the sole consideration is a letter designed to influence a zoning decision by a public body, and b) the letter is materially false?

7. Whether, in order for a plaintiff to be barred by his own laches, it is necessary to show that he not only slept on his rights to the prejudice of the other party, but that he also received valuable consideration for releasing his claim?

8. Whether a builder may be required to execute a contract calling for the construction of a building when the uncontradicted architectural testimony is that the building called for by that contract cannot be built?

9. Whether a shopping center builder may be ordered to erect a store for one tenant according to plans not yet in existence when other tenants not before the court have the right to disapprove such plans?

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United States Court of Appeals

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Appellants,

—v.—

CITY STORES COMPANY,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This is an appeal from the June 13, 1967 judgment and order of the District Court (Gasch, J.) in favor of appellee. F. 1-3*.

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* References to pages in the folder of record materials submitted herewith in lieu of a printed joint appendix are designated "F" followed by the page number. The court's Opinion and "Supplemental Memorandum" are reproduced as Appendices C and D, pp. 11a, 36a *post*.

In view of the unusual manner in which the case was tried (see pp. 7-18, *infra*) the record document designated Plaintiff's Exhibit E ("PX-E") consists of City Stores' exhibits identified at various depositions and the pre-trial proceedings; plaintiff's Exhibit G ("PX-G") consists of defendants' exhibits identified at various depositions and the pre-trial proceedings. References to the trial transcript herein are designated "Tr." References to the deposition transcripts are to the name of the deponent, followed by plaintiff's exhibit designation.

The district court had jurisdiction under 28 U.S.C. §§ 1332, 2201, 2202, and also under D. C. Code § 11-521 (Supp. V, 1966). Amended Complaint, ¶ 1, F. 454. The Notice of Appeal was filed June 27, 1967. F. 549. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

City Stores Company, owner of Lansburgh's, contends in this case that appellants, the builders of Tysons Corner Regional Shopping Center, had agreed orally to build a multimillion dollar department store building for Lansburgh's in exchange for a letter which allegedly influenced the Fairfax County Board of Supervisors to decide a zoning case in the builders' favor. The Complaint sought to compel the builders to build the store at their Tysons Corner Center, in which they are now erecting department store buildings for the Hecht Company and Woodward & Lothrop.

Alternatively, City Stores sought $50 million in damages, which it said was the value of the lease to Lansburgh's in the event specific performance could not be granted. City Stores also sought damages of $10 million, which it said was the value of its letter in the zoning case.[2] Before trial, City Stores voluntarily dismissed both of those damage claims with prejudice because of appellants' demand for a jury trial thereon.

The builders denied that they had ever entered into any such oral or written agreement with City Stores.

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[1] *Amended Complaint*, Count III, F. 473-74

[2] *Amended Complaint*, Count IV, F. 474-75, see also note 34 *infra*.

The Parties

Appellants* are local builders and developers of regional shopping centers in the metropolitan Washington, D. C. area. They are responsible for the development, construction and current operation of the Wheaton Plaza shopping center in nearby Maryland.[3] Their Tysons Corner Center will have approximately 1.5 million square feet of enclosed space, at a contemplated construction cost of approximately $30 million, and will be one of the largest of its kind in the United States.[4]

The center is presently limited to three major department stores.[5] Tenants for two of these—the Hecht Company and Woodward & Lothrop—executed the required construction contract and lease agreements in December 1965 after three years of discussions with the builders, six months of which involved intensive negotiations.[6] Under these lengthy and complex agreements, the builders agreed to construct large department store buildings at the center for those stores in accordance with plans, specifications and working drawings each had previously submitted.[7] The Hecht and Woodward & Lothrop buildings

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[1] Amended Complaint, ¶¶ 3, 9(b), F. 455, 457.

[4] PX-G, blue tab 7, pp. 1, 4, F. 379, 382.

[5] PX-D, p. 56, F. 1308A.

[6] PX-E, white tabs 8, 9; Tr. 152-53, F. 1602-03.

[7] DX-R; Tr. 798-800, 809, F. 1782-84, 1793.

* The principal defendant below, and appellant herein, is Tysons Corner Regional Shopping Center, a partnership composed of Theodore N. Lerner, H. Max Ammerman, their wives, and the Gudelsky Company, which is the successor in interest to the late Isadore Gudelsky, who died in December 1963. The Gudelsky Company is a partnership composed of Homer Gudelsky and the Estate of Isadore Gudelsky. Appellants are sometimes referred to for convenience as the "builders." Amended Complaint ¶¶ 3, 6, F. 455-56; Merriman Dep. (PX-X), pp. 39-42, F. 1352-55; PX-E, white tabs 8, 9, p. 143.

each reflect their distinctive images.[7] The Hecht Company's building is to be virtually identical to its store at the Landmark Shopping Center in Alexandria, Virginia.[8] Both these construction contract and lease agreements limit the Tysons Corner Center to three major department stores. City Stores filed this suit to prevent the builders from concluding an agreement to construct and lease the third store for Sears, Roebuck, and to compel the builders to build a store for Lansburgh's instead.[11]

Lansburgh's, Washington's oldest department store, has declined in position over the years, principally because of poor merchandising policies and failure to pursue suburban locations.[12] It is now owned by appellee, City Stores Company, which operates department stores throughout the eastern United States from its New York City headquarters.[13]

City Stores' Efforts to Secure Branch Locations

By early 1960, City Stores' senior officials recognized that urgent measures had to be taken to meet the competition of other major stores in the Washington area, principally Woodward & Lothrop, the Hecht Company, and Sears, Roebuck, all of which had vigorously pursued a policy of establishing branch stores throughout the suburbs. City Stores engaged Mr. Charles H. Jagels to become President of Lansburgh's because it believed he would be able

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[7] Tr. 574, 614-15, 721, 798, F. 1686A, 1705-06, 1766, 1782.

[8] Tr. 798, F. 1782.

[11] PX-E, white tabs 8, 9, at p. 112.

[12] Amended Complaint ¶¶ 9(dd), 10, F. 468, 469.

[13] Frankel Dep. PX-M, p. 32, F. 1086; PX-E, white tab 13, F. 395-96; Tr. 740-41, F. 1774-75; PX-G, white tab 50, F. 372.

[3] Amended Complaint ¶ 2, F. 454.

to secure branch locations at regional shopping centers, in which type of center appellee was primarily interested.[14]

Lansburgh's failed to stir much interest among regional shopping center developers, however.[15] The reputation and ability of a store to draw people to the center are important to developers since they depend for their profits on rentals computed as a percentage of the gross volume of business done at the centers.[16]

One exception to the array of uninterested developers confronting Jagels was the partnership of Isadore Gudelsky and Theodore N. Lerner, which had developed the bustling Wheaton Plaza Center and was in the process of planning regional centers at other locations in the Washington, D. C. suburbs. Both Gudelsky and Lerner expressed interest in the possibility of Lansburgh's becoming the third department store at Wheaton Plaza. Jagels thereupon concentrated his efforts on the Gudelsky-Lerner shopping center ventures.[17] Thus, he was also interested in the possibility of a Lansburgh's store at appellants' proposed Riverside Plaza (Oxon Hill) center.[18] Furthermore, in the course of the Wheaton Plaza negotiations in early 1962, Mr. Jagels also learned of the Gudelsky-Lerner plans for Tysons Corner.[19] Mr. Jagels expressed interest in getting Lansburgh's into that center as well.[20]

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[14] Amsterdam Dep. (PX-I), pp. 8-9, F. 1119-20; Jagels Dep. (PX-H), pp. 4-6, F. 1186-87; PX-B, pp. 58-59, 82-85, F. 1291-92, 1298-1301.

[15] PX-G, white tab 50, F. 372; Bohling Dep. (PX-T), p. 37, F. 1339.

[16] Tr. 170-71, F. 1615-16; Tr. 736, F. 1770.

[17] Jagels Dep. (PX-H), p. 24, F. 1206; Jagels Dep. (PX-R), pp. 18, 93, F. 1407, 1432; Tr. 59-60, F. 1533-34.

[18] Tr. 113-14, F. 1576-77; Jagels Dep. (PX-H), p. 24, F. 1206; Amsterdam Dep. (PX-I), p. 18, F. 1126.

[19] Amended Complaint ¶ 9(c), F. 457-58; PX-B, p. 23, F. 1267.

[20] Amended Complaint ¶¶ 9(c), (d), F. 457-58.

The relationship between Mr. Jagels and Mr. Lerner which ensued as a result of all these contemplated ventures became "very close."[21] Jagels was principally interested in the Wheaton Plaza branch possibility, since that Center was an established success.[22] That alternative began to face difficulties, however: the builders believed that Lansburgh's should in all fairness pay a rental premium for coming into an already established and successful center.[23] Moreover the existing major tenants—Montgomery Ward and Woodward & Lothrop—had reserved the right to approve entry into the Center by another department store,[24] and Jagels was concerned in May and June, 1962, that at least one, if not both, of these stores might not approve Lansburgh's.[25]

The Tysons Corner area was then the subject of a Fairfax County zoning case.[26] Mr. Jagels had reason to hope the Gudelsky-Lerner zoning application would prevail over the application by the developers of a rival adjacent tract (Rouse-Reynolds), because Gudelsky and Lerner contemplated a center having two major stores, whereas the rival applicant planned a center of 3 or 4 major stores,[27] which

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[21] Jagels Dep. (PX-H), p. 29, F. 1211.

[22] PX-G, white tab 62, F. 376; Frankel Dep. (PX-M), pp. 32-33, F. 1056-57; see also n. 17, *supra*.

[23] PX-E, white tab 19, F. 397-401; Tr. 61-62, F. 1535-36.

[24] DX-L; Tr. 57, F. 1531.

[25] PX-G, white tab 62, F. 376; Jagels Dep. (PX-R), p. 11 (with which see PX-G, white tab 3, F. 325), pp. 13-16, F. 1400, 1402-05.

[26] Amended Complaint ¶ 9(e), F. 458.

[27] PX-G, white tab 1, p. 22, F. 325; Tr. 84-85, F. 1558-59; PX-E, white tab 28, ¶ 1, F. 463; PX-AA, May 31, 1962 minutes, p. 83, F. 523.

Jagels thought would be uneconomical for Lansburgh's.[28] City Stores alleged that while all other major department stores in the area had declined to express a preference between the Rouse-Reynolds and Gudelsky-Lerner tracts at Tysons Corner, Lansburgh's was willing to indicate its preference for the Gudelsky-Lerner tract.[29] Mr. Jagels advised Mr. Lerner that Lansburgh's had been making an intensive study of the Tysons Corner area and that that study showed the Lerner-Gudelsky tract to be superior to the Rouse-Reynolds tract. Mr. Jagels stated that he was therefore in a position to, and would, write a letter to that effect for use before the Fairfax County Board.[30] The Complaint alleged that Messrs. Gudelsky and Lerner then requested Lansburgh's assistance in obtaining a favorable ruling from the Fairfax County Board, and orally agreed with Lansburgh's on the spot that if the application for rezoning should be successful they would give Lansburgh's "the opportunity to become one of the major tenants of the Tyson's Corner shopping center with rental and terms at least equal to that of any other major department store in the center."[31]

Mr. Lerner categorically denied the existence of any such agreement with Mr. Jagels.[32] Mr. Jagels admitted that he did not recall the critical conversation, but only assumed

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[28] Jagels Dep. (PX-H), pp. 21, 31-32, F. 1203, 1213-14; PX-G, white tab 1, p. 22, F. 325.

[29] Amended Complaint ¶ 9(g), F. 458-59.

[30] PX-C, p. 121, F. 1306; Tr. 69-70, F. 1543-44.

[31] Amended Complaint ¶ 9(h), F. 459.

[32] Lerner Dep. (PX-P), p. 77, F. 1038; Tr. 107, 300-301, F. 1570, 1643-44.

that it occurred,* and that the basis for *that* assumption rested, not on facts, but on a further assumption.**

On May 29, 1962, Mr. Jagels wrote the following letter to Mr. Gudelsky and Mr. Lerner, to be added by them, if

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* On cross-examination, Mr. Jagels stated as follows:

A. Mr. Lerner and I had an agreement, had a pact that my letter would be presented to him if and when I got the letter [the alleged "option," see p. 10, *infra*] from him. Exhibit A [the May 29 letter], I believe was delivered to him in my office on the 29th.

Q. And did you have a conversation with Mr. Lerner on this subject?

A. Yes, I did.

Q. Do you remember that conversation clearly?

A. No, I don't.

Q. Isn't it the case, Mr. Jagels, that you really don't recall any such conversation at all?

A. Well, in order to arrive at an agreement, you have to have conversation.

Q. Please just answer the question, Mr. Jagels. You don't recall the conversation at all?

A. I don't recall—

THE COURT: Wait a minute. The witness may explain his answer.

MR. BRENNER: Very well.

THE COURT: Now you may take your time and explain your answer.

THE WITNESS: As far as I am concerned, this is sort of the gist of the whole thing:

I had been in the business world at this time some 30—several—35 years, and this is the kind of an arrangement that I would not have made. I would not have written this letter unless I had the letter from Mr. Lerner and Mr. Gudelsky in hand, and I couldn't have the letter from Mr. Lerner and Mr. Gudelsky without an exchange of words with Mr. Lerner, which I insist took place.

I'm sorry I cannot tell you when or how or what words we used but I certainly know that—know this conversation took place or the letter would not have been written. (PX-B, pp. 38-39, F. 1282-83).

** As the testimony quoted above shows, the basis for Mr. Jagels' assumption that there had been an oral agreement was that there had been a simultaneous exchange of the two letters. As to the alleged exchange, Mr. Jagels admitted (PX-H, p. 41, F. 1223):

> I don't know, but I am assuming that he left me Exhibit B [the undated letter] at that time, in view of the fact that there was no address on the letter. It couldn't have arrived in the mail and I would not, of course, have given them the letter dated May 29th without having this letter in hand, so I am

they wished, to the voluminous record then being made in the zoning case:[33]

> In view of our several discussions on the Tyson's Corner area as a place for a Regional Shopping Center, I am pleased to say that we have now completed our rather exhaustive surveys and are in a position to give you our firm position on the subject.
>
> We are convinced that the Gudelsky-Lerner tract, to which you refer as the Tyson's Triangle, is superior to any other. Being located on the Beltway, it has an unexcelled advertising value. Its location on both Route 7 and Route 123 gives it access to all local traffic.
>
> Since the Tyson's Triangle site will be developed almost exclusively to commercial uses, it also assures a live center with no dead spots. It is also readily available to automobile traffic without other competing uses within the Triangle.
>
> If you and your associates gain approval to build a Regional Shopping Center on this property, Lansburgh's would be very interested in becoming a major tenant with a full line department store. This interest is, however, restricted to this particular location only* and is further conditional upon there being only one regional center in the Tyson's Corner area.

This is the letter which City Stores claims was worth $10,000,000 to the builders.[34] Unknown to the builders, the representation in the letter that Lansburgh's was expert on the comparative merits of the two tracts was false.[35]

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assuming that the same messenger that picked up my letter delivered his letter.

See also Jagels Dep. (PX-H), pp. 35-36, F. 1217-18.

[33] App. E, p. 41a, *post*; PX-E, orange tab 1, ¶ 9, F. 418-19; PX-B, pp. 23-24, F. 1267-68.

[34] PX-C, p. 120, F. 1305; Amended Complaint ¶ 26, F. 475.

[35] See pp. 55-57, *infra*.

* This referred to "the Tysons Corner area generally," not to the Gudelsky-Lerner tract. Jagels Dep. (PX-H), pp. 48-49, F. 1229-30.

In any case, the district court did not accept City Stores' contention that Lansburgh's assistance was "extensive and important"[36] and, indeed, did not find that the letter (which was used only during rebuttal)[37] served any useful purpose at all. The Fairfax County Board's decision on May 31, 1962 in favor of the builders turned largely on technical issues, such as traffic flow[38] and storm drainage, and followed weeks of consideration by the Planning Commission of evidence submitted by architects and traffic experts.[39] The May 29, 1962 letter constitutes the sole claimed consideration for the contract which City Stores says is worth $50 million to Lansburgh's.[40]

Mr. Gudelsky and Mr. Lerner jointly responded to Mr. Jagels' May 29 letter as follows:[41]

> We very much appreciate the efforts which you have expended in endeavoring to assist Mr. Gudelsky and me in our application for zoning at Tyson's Corner for a Regional Shopping Center.
>
> You have our assurance that in the event we are successful with our application, that we will give you the opportunity to become one of our contemplated center's major tenants with rental and terms at least equal to that of any other major department store in the center.

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[36] Amended Complaint ¶ 9(i), F. 459.

[37] PX-AA, May 31, 1962 transcript excerpts, pp. 161-62, F. 526-27.

[38] PX-AA: County Board Official minutes, May 31, 1962, pp. 401-402, F. 539-41; July 18, 1962 transcript excerpts, pp. 9-12, F. 528-31; Planning Commission minutes, May 7, 1962, pp. 116-17, F. 547-48; DX-N, F. 516; DX-O, F. 517.

[39] PX-AA: County Board Official minutes, April 11, 1962, p. 271, F. 534-35; May 9, 1962, p. 342, F. 536-37; July 18, 1962, pp. 9-10, F. 542-45; Planning Commission minutes, May 7, 1962, F. 547-48; PX-E, pink tab 5 ("Exhibit B").

[40] PX-C, p. 120, F. 1305; Amended Complaint, Count III, F. 473-74.

[41] PX-E, pink tab 4.

This letter, which is undated, is the document which City Stores in its Complaint (but never before) christened an "Option for a Lease."[42] The builders, on the other hand, contend that they considered harmless[43] Mr. Jagels' request that they sign this letter, which they contend he drafted.[44] They assumed he wanted to be able to show his New York office that he had made some progress in his expansion efforts[45] by securing a commitment from the builders, especially Gudelsky, to avoid at Tysons Corner the two principal obstacles Lansburgh's faced at Wheaton Plaza—the veto right of other tenants and the builder's demand for a rent premium.[46] The evidence is in any case undisputed that Gudelsky (who had by far the largest financial interest at stake)[47] executed this letter on the understanding that it was not intended to create a legally binding obligation.[48]

Mr. Lerner, as the junior partner in the venture, was careful to submit to Mr. Gudelsky's attorneys documents he thought might have legal consequences, but this document

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[42] Amended Complaint ¶ 9(j), F. 459.

[43] Tr. 700, 111, F. 1746, 1574.

[44] Tr. 411-415, F. 1660-64. City Stores relied below on the fact that Mr. Lerner "had not requested that it [the language of the undated letter] be changed at the time it was signed." Plaintiff's November 7, 1966 Memorandum of Points, p. 35, F. 497A.

[45] Tr. 60-61, 91-92, F. 1534-35, 1565-66; PX-G, white tab 64, F. 378; Jagels Dep. (PX-R), pp. 20-21, F. 1409-10; see also note 14 *supra*.

[46] Lerner Dep. (PX-P), pp. 72-78, 80-82, F. 1033-39, 1041-43; PX-D, pp. 68-70, F. 1310-12; Tr. 105, F. 1568.

[47] Lerner Dep. (PX-P), p. 10, F. 1010; Tr. 109, F. 1572; PX-B, pp. 24-25, F. 1268-69; he had executed other documents jointly with Mr. Lerner which were of a nonbinding character. DX-A; PX-E, white tab 27, F. 402.

[48] Tr. 677, 700, F. 1723, 1746; Lerner Dep. (PX-P), p. 76, F. 1037.

was not so submitted."[29] (Similarly, Mr. Jagels did not consult City Stores' legal staff or his own attorneys before entering into the alleged transaction.)[30]

Upon receipt of this undated letter, Mr. Jagels sent copies of the correspondence to Mr. Amsterdam, Chairman the Board of City Stores, with the following letter:[31]

> Attached is copy of the letter we sent to the Gudelsky group in connection with Tysons Corner and a copy of their reply to us, committing themselves to Lansburgh's as a major tenant in the area. Also enclosed is a copy of the news release on the Center.
>
> Fortunately, the Gudelsky tract was selected by the Commission on Thursday by a vote of 4 to 2. I would appreciate your bringing Dede up to date on this activity which occurred while he was abroad.*

Mr. Amsterdam's response was as follows:[32]

> Sorry your letter of June 4 got to me in Philadelphia instead of New York. However, I find that you caught up with Dede and gave him the story. I think you are in an interesting, perhaps even an advantageous, position. I shall be watching with unusual interest further developments.
>
> Good luck!

These four letters—the May 29, 1962 letter to Lerner-Gudelsky, the undated reply, the June 4 transmittal from

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[29] Tr. 108, F. 1571.

[30] PX-B, p. 26, F. 1270; Zipin Dep. (PX-K), pp. 5-6, 12, F. 1150-51, 1157.

[31] App. G, p. 43a, *post*.

[32] App. H, p. 45a, *post*.

* Since City Stores agreed that the term "commitment" does not mean the same thing as "obligation" (at least, to department store presidents), the phrase "committing themselves to Lansburgh's" in this letter conveyed only appellants' intent to negotiate a lease with Lansburgh's rather than "that they had a legally binding arrangement." PX-M, p. 23, F. 1079. See also Jagels Dep. (PX-R), p. 21, F. 1410; Zipin Dep. (PX-K), pp. 7-8, F. 1152-53.

Mr. Jagels to his superior at City Stores, and the acknowledgment of that letter—constitute the entire contemporaneous written record bearing on the parties' relations at approximately the time the alleged oral agreement was supposed to have been made. The four letters are reproduced as Appendices E, F, G and H to this brief.

The 1962 and 1963 minutes of the meetings of the Board of Directors and executives of City Stores Company and of Lansburgh's Executive Committee contain many references to developments concerning various stores and branches of the City Stores Company, including Lansburgh's, and of attempts to secure new suburban stores. There is no mention of any right or alleged right at Tysons Corner.[53]

City Stores' First Assertion of a Contract at Tysons Corner

In July 1962, Mr. Jagels wrote a memorandum to his superiors which, he testified, reflected his concern over Montgomery Ward's attitude toward a Lansburgh's store at Wheaton Plaza.[54] The builders similarly ran into difficulties trying to convince the Hecht Company and Woodward & Lothrop (who were regarded as the most important tenants for a regional center in this area)[55] that it would be advantageous to have Lansburgh's in the Tysons Corner Center.[56] Mr. Lerner did at one point succeed in persuading the Hecht Company to go along with an arrangement in which Lansburgh's would be the third store, and Sears

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[53] PX-G, white tabs 31, 32, F. 345-63; DX-S.

[54] Jagels Dep. (PX-R), p. 11, F. 1400.

[55] Tr. 611-12, F. 1702-03; Lerner Dep. (PX-P), pp. 93-94, F. 1047-48.

[56] Tr. 127, 147-48, F. 1590, 1597-98; PX-E, orange tab 1, ¶ 16, F. 421-22.

Roebuck the fourth.[57] There was concern, however, over City Stores' February 1963 report of substantial operating losses during 1962, since a prospectively empty store in a shopping center was considered seriously harmful to the business of the other tenants.[58]

In November 1963, Mr. Jagels was advised of the final collapse of all efforts to induce Montgomery Ward to withdraw its previously asserted objections to a Lansburgh's store at Wheaton Plaza.[59] The parties dispute whether, at a meeting held in December 1963 (a few days before Mr. Gudelsky's death), City Stores asserted that the builders were legally obliged to negotiate a lease for a Lansburgh's store at Tysons Corner.[60] It is undisputed, however, that soon after publication of City Stores' February 1964 Annual Report showing another year of heavy losses,[61] Mr. Lerner told Mr. Jagels that he doubted that a Lansburgh's store could be accommodated at Tysons Corner.[62]

On April 21, 1964, Mr. Jagels sent a registered letter to Mr. Lerner asserting that the undated letter referred to above imposed legal obligations upon the builders.[63] This was the first time such an assertion was made in writing by City Stores to the builders.[64]

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[57] PE-E, green tab 18, p. 1, F. 413.

[58] PX-E, green tab 18, p. 1, F. 413; Tr. 123-124, 127, F. 1586-87, 1590; PX-BB, F. 512.

[59] PX-E, green tabs 10(a), 10(b), F. 411, 412; Tr. 127-28, F. 1590-91.

[60] Jagels Dep. (PX-H), pp. 58-60, F. 1240-42; Lerner Dep. (PX-P), p. 95, F. 1049; Tr. 130-31, F. 1593-94.

[61] PX-BB, F. 512.

[62] Jagels Dep. (PX-R), p. 30, F. 1419; PX-G, white tabs 7, 67, F. 331-32, 550; Tr. 147-48, F. 1597-98.

[63] Exhibit E to the Complaint, F. 432.

[64] Tr. 150, F. 1600.

The Builders' Denial of the Contract Claim; City Stores' Laches

The builders in May 1964 responded to Mr. Jagels' April 21 letter, flatly denying that the undated letter constituted any such obligation "in fact or as a matter of law." They said:[65]

> In response to your letter of April 21, 1964 pertaining to Lansburgh's inclusion in the Tyson's Corner Regional Shopping Center pursuant to an understanding with Messrs. Gudelsky and Lerner, please be advised as follows:
>
> We have heretofore advised you on more than one occasion that the Executors of the Estate of Isadore Gudelsky and Mr. Lerner do not consider that the letter referred to by you as a "binding obligation" is such in fact or as a matter of law. I believe you will recognize that an interest in land must be reduced to writing, and such writing must be in such form as to leave no doubt as to the extent of the obligations of any of the parties involved.
>
> In any event, I am in doubt, from the tone of your letter, whether you deem yourself fully excluded from our plans with reference to all our contemplated shopping centers. I cannot conceive that we should be dealing with you with respect to one or more locations and possibly litigating with you with respect to another.
>
> Any clarification will be appreciated.

City Stores has never responded to this letter.[66]

City Stores knew that the builders had been seriously considering the possibility of erecting a four-store center at Tysons Corner.[67] City Stores asked its professional

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[65] Exhibit F to the Complaint, F. 433.

[66] Tr. 149, F. 1599.

[67] PX-G, white tab 25, F. 340-42.

marketing consultants to determine whether a Lansburgh's store at Tysons Corner would be profitable if four major stores were located there. The report was discouraging.[68] In September 1964, Mr. Jagels sent the following letter to Mr. Lerner:[69]

> Dear Ted:
>
> We are presently attempting to finalize our plans for new stores in the Washington area.
>
> We would like, therefore, to sit down with you to review the current situation at Tyson's Corner and to discuss with you lease terms, opening dates, etc.
>
> I look forward to hearing from you in this connection in the near future, either by phone or mail.
>
> Best regards.

Since this ostensibly friendly letter was the first word from Lansburgh's following the builders' formal rejection the previous May of Lansburgh's claim of a legal obligation, and Mr. Jagels made no mention of that claim, this letter was viewed as reflecting a decision not to press the claim.[70]

On September 28, 1964, City Stores' officials acknowledged to its professional market consultant that Lansburgh's "had been shut out of at least two other shopping center developments because of their reputation or lack of it."[71]

Seven months then passed. On April 25, 1965, after long negotiations, the builders executed letters of intent with the Hecht Company and Woodward & Lothrop, limiting

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[68] PX-G, white tab 49, p. 2, F. 367; Bohling Dep. (PX-T), pp. 64-65, F. 1344-45.

[69] Exhibit G to the Complaint, F. 434.

[70] Tr. 176-77, F. 1621-22.

[71] PX-G, white tab 50, F. 372.

the center to three major department stores, and covering many of the basic lease terms at Tysons Corner[72] to which the builders never would have agreed had they known that they might be required to give the identical terms to Lansburgh's.[73] In June 1965 (after seeing a newspaper announcement that the center would be limited to three stores)[74] City Stores' officials suddenly revived the claim—rejected by the builders 13 months previously—that the builders were legally obligated to Lansburgh's at Tysons Corner.[75]

In July 1965, City Stores demanded to be advised "whether you intend to negotiate a lease with us at Tysons Corner or not."[76]

On January 12, 1966, City Stores brought this suit for Declaratory Judgment, Injunctive Relief, Specific Performance and Damages. The relief sought in paragraph 19 of the Complaint was that the builders

> be compelled, by order of this Court, to specify in writing to Plaintiff the rental terms of each of the lease agreements that have already been entered into for a major department store at the Tyson's Corner shopping center and, upon notice of acceptance of the rental and terms of either of such agreements given by Plaintiff to Defendants within a reasonable time after receipt of such specifications, to execute a lease agreement with Plaintiff for a major department store at the Tyson's Corner shopping center at the rental and upon the terms so accepted by Plaintiff.

As has already been noted, City Stores dismissed its damage claims with prejudice before trial.

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[72] App. I, p. 46a, *post*.

[73] Tr. 172-73, F. 1617-18.

[74] PX-G, white tab 2, F. 326-27.

[75] Exhibit J to the Complaint, F. 435.

[76] Exhibit N to the Complaint, F. 436.

The Trial and the District Court's Decision and Order

At the trial before the court, City Stores presented no live testimony but instead relied principally upon the discovery depositions taken by both parties, the exhibits thereto, and the transcripts and exhibits of the preliminary injunction proceedings."

The district court, ruling in favor of City Stores, concluded that the builders had orally agreed to build a department store for Lansburgh's at Tysons Corner in exchange for a letter to be used in a zoning hearing. The district court found the existence of the oral agreement notwithstanding Mr. Lerner's denial of it and the fact that Mr. Jagels, then President of Lansburgh's and the only other witness or party to the alleged agreement, admitted on cross-examination that he could not really recall the conversation, but only assumed that it had taken place. The court found that the letter provided by Lansburgh's was adequate consideration for the agreement valued at $50,000,000 by City Stores even though it cost Lansburgh's nothing, promised nothing, and was materially false. The court further concluded that, upon receipt of this letter, the builders were obligated to deliver the undated letter. The court further concluded that this undated letter was an option despite the fact that it did not resemble an option in form, language, or terms. The court also viewed this letter as a memorandum of the oral agreement between Mr. Jagels and Mr. Lerner though it nowhere stated that Lansburgh's May 29, 1962 letter was the quid pro quo for the valuable rights which Lansburgh's claimed. The court agreed with the builders that the alleged contract left "substantial terms open for future negotiation,"[7a] but

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[7] Tr. 2-13, F. 1511-22.

[7a] Op., App. C, p. 23a.

held that option contracts are exempt from the requirement that a contract to be enforceable must include all material terms.

The court did not find that City Stores ever relied on the alleged option agreement. The court rejected the defense that City Stores was estopped by its own laches from bringing the action, holding that such suit could not have been brought before the Hecht and Woodward & Lothrop leases were executed in late 1965, and that, in any case, City Stores had not received further consideration to compensate it for giving up its rights under the alleged option.

The construction contract and lease agreement which the court ordered the builders to sign is a revision of the Hecht Company construction contract and lease agreement unilaterally modified by City Stores to require the builders to build a different store for Lansburgh's. The builders will be required to build at their own expense and lease to Lansburgh's for up to 70 years the department store building specified not in the contract itself, but in the plans and drawings to be negotiated between the parties later. Nevertheless, this construction contract and lease agreement was found by the court to be sufficiently specific for enforcement. The court's opinion stated that in the event of failure of the parties to resolve all the open points through negotiation the court would provide a master to resolve the parties' differences. The court's Order, however, makes no provision for the appointment of a master.

STATEMENT OF POINTS

1. The district court erred in ordering specific performance of a contract whose existence and terms were not proved by "clear and convincing" evidence.

2. The district court erred in ordering equitable relief in the face of plaintiff's laches and unclean hands.

3. The district court erred in ordering specific performance of a contract where some substantial terms require future negotiations, others are unclear, and still others cannot be performed.

SUMMARY OF ARGUMENT

I

The remedy of specific performance requires that a plaintiff supply "clear and convincing" proof of the existence of the contract and of its terms. *Cleborne* v. *Totten*, 61 App. D.C. 69, 57 F.2d 435 (1932). The proof below of an alleged oral contract pursuant to which the undated letter was allegedly given failed in both respects. In the face of evidence showing the commercial implausibility of the alleged oral contract between the experienced businessmen involved, the court should not have relied for proof of the alleged oral contract on the unsupported testimony of Mr. Jagels, plaintiff's sole witness to the alleged transaction, which turned out to be no more than his assumption that such an oral transaction had taken place. Mr. Jagels admitted that he only assumed that there had been an oral agreement to exchange the May 29, 1962 letter for the undated letter, but that assumption rested on his further assumption that the two documents had, in fact, been simultaneously exchanged. The builders proved by a completely disinterested witness that the documents had not been simultaneously exchanged. This should have required rejection of Mr. Jagels' testimony that there had been an oral contract.

Since Mr. Jagels had many good business reasons for wishing to help the builders' zoning application, there was no basis for a conclusion that his furnishing of the May 29,

1962 letter itself proved that it was written pursuant to an oral contract to exchange it for the undated letter.

The language of the undated letter is at least as consistent with the conclusion that no contract was intended as it is with City Stores' contention that it was intended to be an "Option for a Lease", given for valuable consideration. City Stores relied entirely on oral testimony to prove an alleged oral contract pursuant to which the undated letter was allegedly delivered. The sole documentary proof offered by City Stores of the alleged oral contract, is the undated letter itself. Under these circumstances, the undated letter does not establish that there was a contract between the parties, and for that reason does not constitute a sufficient memorandum of the alleged oral contract under the Statute of Frauds.

Furthermore, as established by ordinary dictionary meanings as well as by the usage of City Stores itself in this litigation, there was no warrant for converting the term "opportunity to become a tenant" in the undated letter to "option to become a tenant."

II

Since the district court found that the alleged contract in this case left substantial terms open for further negotiation, the court should have dismissed the Complaint on the ground that the parties did not enter into a contract. Contrary to the decision of the court below, the rule that there is no contract if substantial terms remain to be negotiated applies fully to the contract alleged in this case. The undated letter does not even rise to the dignity of a letter of intent which ordinarily covers a great many of the details to be incorporated in the ultimate construction contract and lease agreement and yet which is not legally binding because further negotiations over the detailed con-

struction plans for the store building are contemplated. Since the contract calls for the construction of a large custom-designed building whose plans remain to be negotiated, the gaps in the alleged contract cannot be filled by supplying ordinary and usual covenants which can fairly be said to have been within the parties' contemplation. As a consequence of this error of law, the district court's order imposed upon the builders terms to which they never agreed.

III

The contract alleged in the Complaint is one which as a matter of public policy cannot be enforced, because the consideration on which it is founded was an attempt to influence a legislative decision. *Hazelton* v. *Sheckels*, 202 U.S. 71 (1906). So far as that rule of law is concerned, it does not matter whether the plaintiff actually used improper means in attempting to influence the Fairfax County Board's zoning decision. The "unclean hands" doctrine nevertheless requires recognition of the fact that Mr. Jagels' May 29, 1962 letter, which was the sole consideration for the contract sought to be enforced, falsely represented to the County Board that Lansburgh's preference for the Gudelsky-Lerner tract over the rival tract was based upon an expert appraisal of their relative merits.

IV

The court below should have held the claim barred by reason of laches. Contrary to the court's decision, City Stores need not have waited until July 1965 to press its claim, but could have brought suit in May of 1964 when the builders denied that the claim had any validity "in fact or as a matter of law." That delay, together with City Stores' indication in September of 1964 that it would not

press its claim, was severely prejudicial to the builders, who signed letters of intent with Woodward & Lothrop and the Hecht Company in April 1965. By those letters, the builders committed themselves to having no more than three major stores in the center. Had they known City Stores would press its claim, they might have retained the right to have a fourth store in the center, thus keeping open the possibility of securing Sears, Roebuck as a tenant, with the unique benefits such a store provides to a regional shopping center. By signing the letters of intent, the builders also committed themselves to a particular combination of minimum and percentage rent to which they never would have agreed had they known that the same formula would be applicable to Lansburgh's, whose anticipated sales volume is substantially smaller than that of the Hecht and Woodward & Lothrop stores.

The court misconstrued the builders' laches defense as claiming that City Stores had released its claim, and held that such release was ineffectual in the absence of a receipt of consideration therefor. No such contention was made by the builders, and as a matter of law consideration is irrelevant to the defense of laches.

V

Having found that "substantial terms" had been left open by the parties for future negotiation, the court, in effect, ordered the builders to negotiate and agree with City Stores over the cost and design of a department store building to be erected by the builders at their own expense. The court indicated that the builders should erect a building "that costs substantially the same amount of money as that built for the Hecht Company" according to designs fashioned by "the parties' architects . . . from the potential combinations and variations of ideas at their disposal." In

so doing, the court failed to account for the fact that the builders had been able to estimate the cost of the Hecht store in advance of the time the contract was signed, because the Hecht Company had previously submitted detailed construction plans for that building which had been the subject of intensive negotiations between the Hecht Company and the builders before the builders executed the contract. Without such plans, there can be no way of knowing whether the building to be specified by City Stores in the future will, in fact, not cost substantially more than the Hecht store. Nor does the court's Order provide any mechanism (which was unnecessary in the Hecht contract) to settle disagreements between the builders and City Stores over the cost estimates.

The Order puts the builders in peril of contempt if they should disagree with City Stores that the Lansburgh's store to be specified by City Stores is "functionally and aesthetically equal to the exterior designs" of the Hecht buildings. The builders run the same risk of contempt if they should fail to agree that they can construct the building to be specified by City Stores in the future at a cost equivalent to that of the Hecht building.

The court's Order requires the builders to prepare the plans which the Hecht Company prepared, despite the uncontradicted testimony of the builders' architects that they have never designed a department store and are not qualified to do such work. It was also the uncontradicted testimony of the architectural experts that since the proposed Lansburgh's store, unlike the Hecht and Woodward & Lothrop stores, is to have one entire floor underground, the specifications of the contract which the builders are ordered to execute cannot be followed.

VI

Hecht Company and Woodward & Lothrop, which were not before the court, have the right under their contracts with the builders to approve plans for the third department store. The court's Order fails to take any account of such right.

ARGUMENT

I. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN CONCLUDING THAT THERE WAS A CONTRACTUAL OBLIGATION ON THE PART OF THE BUILDERS TO CONSTRUCT A BUILDING FOR LANSBURGH'S AT TYSONS CORNER AND LEASE IT TO LANSBURGH'S FOR UP TO 70 YEARS AS THE QUID PRO QUO FOR A PERFUNCTORY LETTER.

City Stores' entire case rests on the premise that the builders of Tysons Corner Center were willing to put a multimillion dollar project in jeopardy by granting an option of unspecified duration to a store which other regional center developers would not even consider for a tenancy,[79] and whose presence in the center might chill the interest of prospective tenants for the remaining store sites, all in exchange for a perfunctory letter from Lansburgh's which "could be used"[80] in the zoning case.

Options for leases for stores to be constructed in regional shopping centers are unheard of in the experience of Lansburgh's, City Stores, and the builders.[81] Mr. Lerner testified:[82]

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[79] See note 15 *supra*.

[80] Op., App. C, p. 12a, *post*.

[81] Tr. 55, F. 1529; Zipin Dep. (PX-K), pp. 11-12, 33-36, 46-47, F. 1156-57, 1166-69, 1169A-69B.

[82] Tr. 55-56, F. 1529-30.

Q. And are options used in connection with regional centers and department stores in regional shopping centers?

A. I have never heard of any being used for that purpose.

Q. And what is the reason, to your knowledge, that options are not used?

A. Options would not serve any useful purpose because you would not know whether or not that particular department store is sincerely interested in proceeding, and the other department stores who constitute a part of a regional shopping center would want to know who the other stores in the center are going to be and they would want to know just where each store is going to be located.

Q. And what effect could the existence of an option have on your ability to finance a center?

A. You couldn't finance a center with an option.

On the other hand, the record shows that it is routine in shopping center zoning cases for the developer to secure letters and expressions of interest from prospective tenants for introduction into the hearing record.[33] There is nothing to suggest that such stores place a high value on these letters, or ask anything from the developers for writing them.

In an attempt to make the trade alleged in the Complaint believable, however, it was alleged that Mr. Lerner and Mr. Gudelsky did not simply ask the stores to state their interest in locating in the Tysons Corner vicinity, but to state a preference for the Gudelsky-Lerner tract over the rival tract.[34] No such proof was offered, however.

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[33] PX-E, white tabs 12, 28 (¶ 12), 35, F. 394, 404; PX-G, white tab 12, F. 334; PX-AA, County Board transcript excerpt July 18, 1962, pp. 16-17, F. 532-33.

[34] Amended Complaint ¶ 9(g), F. 458-59; PX-A, pp. 7-8, F. 1002A-02B; Plaintiff's March 22, 1966 Reply Memorandum, p. 39, F. 491.

There is not a word of evidence to support a finding that Mr. Lerner asked other stores to state a preference for the tract he and Mr. Gudelsky controlled.* The Woodward & Lothrop response to Mr. Gudelsky and Mr. Lerner explicitly characterized the builders' request as an "inquiry as to whether Woodward & Lothrop is interested in Tyson's Corner, Virginia, as a location for a suburban store . . . ."[85] The record shows that the builders did not ask the other major stores for a letter of any type.[86]

If large commercial interests are to be vitally affected by a conclusion that the parties entered into such a bizarre agreement, a high degree of certainty should be required as to both its existence and terms. As stated by this Court in *Cleborne* v. *Totten*, 61 App. D.C. 69, 57 F.2d 435, 438 (1932):

> A decree for specific performance will not be granted unless the evidence of the making of the contract is clear and convincing, and unless its terms, the consideration on which it is founded, and the time of its execution are clearly established.

Accord, Crowell v. *Gould*, 68 App. D.C. 297, 96 F.2d 569, 572 (1938); *DeSollar* v. *Hanscome*, 158 U.S. 216 (1895):

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[85] PX-E, white tab 12, F. 394.

[86] Tr. 70-71, F. 1544-45.

* That finding is implied in the court's finding that:

> Mr. Lerner asked for a letter from Lansburgh's expressing a desire to participate in defendants' Tyson's Corner project, which could be used in the hearing before the Fairfax County Board of County Supervisors. Mr. Lerner had sought similar letters from other department stores in Washington, but found them unwilling to express a preference for defendants' Tyson's Corner site over the nearby proposed site of the Rouse-Reynolds group (Op., App. C, pp. 12a-13a, *post*).

Taylor v. *Hopkins*, 196 Va. 571, 84 S.E.2d 430 (1954); *Milani* v. *Processel*, 15 Ill.2d 423, 155 N.E.2d 38 (1959).*

The reason why a higher degree of certainty of the terms of an alleged contract is required for specific performance, as distinguished from damages, is clearly stated in Pomeroy, Specific Performance § 159 (3d ed.):

> • • • *A greater amount or degree of certainty is required* in the terms of an agreement, which is to be specifically executed in equity, than is necessary in a contract which is to be the basis of an action at law for damages. An action at law is founded upon the mere non-performance by the defendant, and this negative conclusion can often be established without determining all the terms of the agreement with exactness. The suit in equity is wholly an affirmative proceeding. The mere fact of non-performance is not enough; its object is to procure a performance by the defendant, and this demands a clear, definite, and precise under-

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* The cases are collected at 49 Am. Jur., Specific Performance § 169, pp. 191-92, where the rule is stated as follows:

> Where a proceeding is brought for specific performance, the rule seems to be established that *more than a mere preponderance of testimony is required* to establish the existence of the contract when its existence is denied. In order that specific performance of a contract may be decreed, the evidence of the making of the contract must be clear and convincing, or, as stated, in some cases, clear, cogent, and convincing, or strong and conclusive. The contract must be so clearly proved as to satisfy the court that it constitutes the actual agreement between the parties. Unless its terms, the consideration on which it was founded, and the time of its execution are clearly established, or if there is reasonable doubt as to any of these things, equity will not grant relief, for fear of doing greater wrong than by leaving the parties to their legal remedy. It must appear that good conscience and substantial justice require it. This goes to the existence of a writing signed by the party to be charged, sufficiently definite in its terms as to enable identification of the property and its enforcement as well as proof of a consideration therefor. (Emphasis supplied.) *See also*, 81 C.J.S., *Specific Performance* § 143.

standing of all the terms; they must be exactly ascertained before their performance can be enforced. [Italics in text]

1. *City Stores Failed to Establish That the Builders Agreed to Grant a 50 Million Dollar Option in Exchange for Lansburgh's Letter.*

The district court had no sufficient basis upon which to find that the parties entered into the oral agreement alleged in paragraph 9(h) of the Amended Complaint, *i.e.*, that if Lansburgh's wrote the May 29, 1962 letter, and the zoning application was successful, Lansburgh's would be given "an opportunity" to enter Tysons Corner. The district court concluded that pursuant to the oral agreement the builders were obligated to deliver the undated letter after Lansburgh's provided the May 29, 1962 letter.* But where is the "clear and convincing" proof that this oral agreement was made or that the words used had the meaning which Lansburgh's has alleged?**

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* While the decision of the court below rests entirely on its finding that the undated letter was given pursuant to a prior oral contract, it should be noted that there is no document, or combination of documents, which constitute a contract. Certainly the May 29, 1962 letter and the undated letter in reply to it do not constitute a contract. In the May 29, 1962 letter Lansburgh's expressed its interest, but only its interest, in Tysons Corner. A mere expression of interest is not a promise to do anything or, indeed, even an offer which could be accepted so as to create a contract. *Elkhorn-Hazard Coal Co.* v. *Kentucky River Coal Corp.*, 20 F.2d 67 (6th Cir. 1927).

** No witness for Lansburgh's testified at the trial. City Stores' case consisted of depositions, documents and the transcript of the hearing of its motion for preliminary injunction. Of the defendants' witnesses, all but two also gave depositions which were introduced as exhibits at the trial. Under such circumstances, this Court has traditionally regarded itself as "virtually free" to ignore the trial judge's findings and substitute its own. *Dollar* v. *Land*, 87 App. D.C. 214, 184 F.2d 245 (1950), *cert. denied*, 340 U.S. 884 (1951).

Mr. Lerner has consistently stated that no option for a lease was ever requested, promised or given.[37] Mr. Jagels, the former President of Lansburgh's, the only other party to the alleged oral agreement, admitted on cross-examination that he does not recall the critical conversation. He did not recall where or when it took place or what words were used. In fact, he merely *assumed* that it must have taken place.[38] There is not a single document in the record which reports or even refers to the claimed oral agreement.

There was hence no "clear and convincing" proof in this record within the meaning of *Cleborne* v. *Totten*, *supra*, that the parties entered an oral agreement, a rule which should apply *a fortiori* to a contract as commercially improbable as the one alleged in this case. Such a high degree of proof should certainly have been required to find that Mr. Gudelsky and Mr. Lerner, experienced developers, without even so much as consulting their counsel, would have jeopardized their project by trading away an option of unspecified duration to the least desirable of the prospective major tenants for the center in exchange for a letter which said as little as did Mr. Jagels' May 29, 1962 letter. Mr. Jagels may have taken pen in hand and written a one-page letter, but under the district court's decision, no hard nor businessman will ever have received more for having written less. The district court should have viewed the implausibility of the arrangement as compared with the skimpiness of the testimony offered to prove it—a mere assumption—and dismissed the Complaint on that ground alone.

The record shows, furthermore, that there was no basis for Mr. Jagels' assumption that the documents were ex-

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[37] Page 7, *supra*.

[38] Pages 7-8, *supra*.

changed. That assumption, which constitutes the basis for his inference that there was an oral contract pursuant to which the two letters were exchanged, depends completely upon the delivery of the undated letter to Mr. Jagels on May 29, 1962, the date on which, City Stores and the builders agree, the May 29, 1962 letter was handed to Mr. Lerner at Mr. Jagels' office. As shown above, Mr. Jagels' testimony that the documents were exchanged was itself an assumption, rather than his recollection of what actually occurred.[89] We now show that the undated letter was executed and delivered almost one week after the May 29 letter was delivered to Mr. Lerner.

Mrs. Himmelfarb, Mr. Lerner's former secretary, testified that she typed the letter, that Mr. Jagels waited at the office at Wheaton Plaza for Mr. Gudelsky to come in and sign it, that the document was signed at Wheaton Plaza, and that she thereupon handed it to Mr. Jagels, who, she recalled, placed it unfolded in his briefcase.[90] (City Stores has placed the original in evidence, and the Court can thus see that the record copy of that document—the very one Mrs. Himmelfarb handed to Mr. Jagels—has never been folded.)[91] The record establishes that the only day on which Mr. Jagels could have been at Wheaton Plaza during this period was June 4.* Hence, the docu-

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[89] Pages 8-9, *supra*.

[90] Tr. 672-78, F. 1718-24.

[91] PX-E, pink tab 4.

* Plaintiff's November 7, 1966 Memorandum of Points, p. 27, F. 497; see also, Hearing on TRO (PX-A), p. 7, F. 1002A. On Tuesday, May 29, 1962, Mr. Lerner picked up the May 29 letter at Lansburgh's office. The following day, Wednesday, May 30, 1962, was Memorial Day, a legal holiday. The next day, Thursday, May 31, 1962, was the date of the Board hearing. Mr. Lerner was at the Board hearing all day and the hearings did not end until early evening. Plaintiff points out that "it is undisputed that Mr. Jagels

ment was executed and delivered, not in a simultaneous exchange with the May 29 letter at Mr. Jagels' office, but six days later, on June 4, at Mr. Lerner's Wheaton Plaza office. (It will be recalled that Mr. Jagels sent copies of his May 29 letter and the undated letter to New York on June 4, 1962.)[92]

This should have led the court below to reject Mr. Jagels' testimony, that ". . . I would not have written this letter [of May 29, 1962] *unless I had the letter from Mr. Lerner and Mr. Gudelsky in hand*,"[93] and his consequent inference of an oral agreement to exchange the two documents.

The court made no mention of Mrs. Himmelfarb's testimony. Yet, she was the most disinterested witness in the entire case. She had been fired by Mr. Lerner in 1964, because they "didn't get along very well," and had "had some unpleasantness."[94]

As disclosed by the Opinion (App. C, pp. 13a-14a, *post*), the court, apparently concluded, notwithstanding Mrs. Himmelfarb's testimony, that the May 29 letter would not have been written except pursuant to the alleged oral agreement.

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went out of town on May 31 for a college reunion, returned on Sunday, June 3, 1962, and thus was not back in his office until June 4, 1962." Plaintiff's November 7, 1966 Memorandum of Points, p. 27, F. 497. Monday, June 4, 1962, accordingly was the first date after May 29, 1962 when Mr. Jagels could possibly have gone to Wheaton Plaza to get the undated letter signed. His trip to Wheaton Plaza for this purpose did not occur subsequent to June 4 because on that date he sent a copy of his May 29, 1962 letter and what he referred to as the "reply" to his letter, namely, the undated letter, to Mr. Amsterdam, Chairman of the City Stores' Board of Directors, PX-E, pink tab 5. Consequently, the date of the undated letter is fixed as June 4, 1962.

[92] App. G., p. 43a, *post*.

[93] The critical part of that testimony is quoted in full *supra* at p. 8.

[94] Tr. 711, F. 1757.

The factual finding on which that part of the court's Opinion rests is that there could have been no concern over Montgomery Ward's attitude in June, since the court found that that concern first arose in November. That finding is extraordinary. Mr. Jagels himself said that one of his own memoranda, written in July 1962, reflected that:

> . . . there was some doubt in our minds as to Montgomery Ward's attitude towards our coming into the [Wheaton Plaza] center. And the inference here was that Mr. Lerner had some ideas that could correct that situation.[95]

The record also shows other reasons why Mr. Jagels would have written the May 29 letter: (1) the possibility that there might be need to induce Woodward & Lothrop not to veto Lansburgh's entry into Wheaton Plaza;[96] (2) his interest in the builders' Riverside Plaza Center;[97] (3) his interest in the builders' Tysons Corner Center, itself; and (4) his interest in the defeat of the Rouse-Reynolds zoning application at Tysons Corner, since that applicant had plans for a three or four major store center, which Mr. Jagels had concluded would make a Lansburgh's store in the area uneconomical.[98]

As the Virginia Supreme Court said in *Mullins* v. *Mingo Lime and Lumber Co.*, 176 Va. 44, 10 S.E.2d 492, 494 (1940):

> Many services rendered by one businessman for another are undertaken, not with the expectation of pecuniary compensation, but with the hope of procuring and maintaining a friendly relationship between the

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[95] Jagels Dep. (PX-R), p. 11, F. 1400.

[96] Note 25 *supra*.

[97] Note 18, *supra*.

[98] Notes 27, 28, *supra*.

> two. These services represent an item of good will to be consummated, not with direct payments but with reciprocal services in the future, or with more favorable contracts, or with easier credit.

There was thus no basis whatever for the court's conclusion that Mr. Jagels would have had no reason to write the May 29 letter except pursuant to an oral agreement in which the builders promised an option for a lease in exchange.

2. *The Statute of Frauds Precludes City Stores' Attempt to Convert the Undated Letter into an "Option for a Lease."*

Under City Stores' contentions, the relationship between the undated letter and the alleged prior oral contract is circular. Since the language of the undated letter is at least as consistent with the builders' version of its purpose as it is with City Stores' version,* City Stores is forced to resort to an alleged oral contract for proof that the undated letter was given for consideration** and was in-

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* There can be no doubt that Mr. Jagels would have regarded a commitment by the builders (especially Gudelsky) to avoid giving other Tysons Corner tenants a veto over Lansburgh's as an important step forward for Lansburgh's. As City Stores subsequently advised its professional marketing consultant, "the future of Lansburgh's in Washington was not necessarily in Lansburgh's hands since they had been shut out of at least two other shopping center developments because of their reputation or lack of it." PX-G, white tab 50, F. 372. See also Mr. Jagels' testimony concerning Landmark Shopping Center in Alexandria, Va., whose developers did not even consider Lansburgh's. "Well, we would have liked to have been consulted. We would like to have had the *opportunity* to make a decision." Jagels' Dep. (PX-R), p. 41, F. 1430.

** The doctrine of past consideration provides yet another reason why City Stores is forced to rely on an alleged oral contract. For if, as Mrs. Himmelfarb's testimony establishes, the undated letter was given 6 days after the May 29 letter, the only way in which the May 29 letter could have provided valid consideration for the un-

tended to be an "Option for a Lease." When asked for proof of that oral contract, City Stores then points to the undated letter. City Stores can make neither point without begging the question as to the other. We submit that this circularity is fatal to City Stores' case.

It is just such a situation as this to which the Statute of Frauds is directed—the danger that ambiguous relationships between individuals will be transmuted into contracts simply on the oral testimony of one of the parties. The undated letter does not independently, within its own four corners, establish that the parties contracted with each other. For that reason, it does not suffice as the documentary confirmation of a contract that the Statute of Frauds requires. *Sherman* v. *Johnson*, 159 Ohio State 209, 112 N.E.2d 326 (1953); *Gedvick* v. *Hill*, 333 Mich. 689, 53 N.W. 2d 583 (1952); *Bennett* v. *Mar-Tex Realization Corp.*, 250 S.W.2d 612 (Tex. Civ. App. 1952). The common law rule is stated as follows:

> The memorandum required by the statute of frauds must show the contract between the parties. It must show an existing and binding contract, and concluded agreement, a meeting of the minds of the parties, as distinguished from mere negotiations . . . or an unaccepted offer. 37 C.J.S. § 180(a).

Our point here is not simply that the undated letter fails to express the *terms* of the alleged contract. Rather, it is

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dated letter would have been pursuant to a prior oral agreement. In the absence of that oral agreement, the undated letter would have been given purely in gratitude for a favor previously rendered, and in the District of Columbia, as elsewhere, it is "well settled that past consideration is no consideration." *Murray* v. *Lichtman*, 339 F.2d 749, 752-55 (D.C. Cir. 1964). Without consideration, of course, "It is elementary . . . that an owner incurs no liability by failing to perform a mere promise to sell land to a particular person." *Rosenkoff* v. *Mariani*, 93 App. D.C. 111, 207 F.2d 449 (1953).

that the undated letter does not confirm or establish that there *was* a contract. This defect goes to the very essence of the Statute of Frauds, and it is in this respect that the burden of proof imposed by the Statute is most demanding, however much its requirements have been relaxed with respect to the need to cover all the details of the agreement. The written memorandum "cannot rest on dubious implications but must be clearly expressed," since unilateral assurances are very suspect when unaccompanied by other evidence. *Keane* v. *Gartrell*, 118 App. D.C. 166, 334 F.2d 556 (1964). Indeed, "a mere assurance that a party may act in a certain matter, standing alone, can not be converted into a contract." *Bellows* v. *Porter*, 201 F.2d 429, 431 (8th Cir. 1953).

The most that appears from the undated letter is a unilateral "assurance" from the builders that Lansburgh's would be given an "opportunity" to become a tenant "in the event" that the builders were successful in their application. The undated letter gives no indication that there is any contractual interdependence between the "efforts" by Lansburgh's and the builders' unilateral undertaking. Whatever Mr. Jagels' subjective intentions, expectations or beliefs may have been, this document simply does not define his relationship with defendants "in the shape of a contract." *Storrow* v. *Concord Club*, 66 App. D.C. 190, 70 F.2d 852 (1934). There is absolutely no written evidence from which it may reasonably be concluded that he and they reached that objective meeting of the minds through the exchange of promises which the law calls a contract.

This rule is not changed by that portion of the District of Columbia Statute of Frauds which provides that the consideration need not be specified. This liberal rule dispensing with the need for describing the consideration in detail in no way changes the fundamental rule that the

writing must show that there *was* consideration, that there *was a contract.*[*]

3. *City Stores Has Not Established by "Clear and Convincing" Evidence That the Builders Promised an "Option," Since All That Was Allegedly Promised Was an "Opportunity to Become a Tenant," Which Is Not an "Option to Become a Tenant."*

The allegations of the Complaint concerning the oral contract, and the court's finding in respect of that oral contract, describe the builders' alleged oral promise in the same language as that used in the undated letter.[99] Therefore, unless an option is necessarily made out from the following language of the undated letter, there is no option at all:

> You have our assurance that in the event we are successful with our application, that we will give

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[99] Amended Complaint ¶ 9(h), F. 459; Op., App. C, p. 14a, *post*.

[*] In construing § 2-201 of the Uniform Commercial Code, which does away with the requirement that contracts of sale must specify the price, the court in *Arcuri* v. *Weiss*, 184 A.2d 24, 26, 198 Pa. Super. 506 (1962), stated:

> * * * The purpose of the Uniform Commercial Code which was written in terms of current commercial practices, was to meet the contemporary needs of a fast moving commercial society. It changed and simplified much of the law which it has supplanted but it also sets forth many safeguards against sharp commercial practices. This section we feel is one such safeguard. While it does not require a writing which embodies all the essential terms of a contract, and even goes so far as to permit omission of the price, it does require some writing which indicates THAT A CONTRACT FOR SALE HAS BEEN MADE. [Emphasis in original.]

Similarly, the Michigan Supreme Court has ruled on this precise point (construing § 26.909 of the Michigan Statutes, which is similar to the D.C. Statute of Frauds). In *Smith* v. *Sheridan*, 175 Mich. 391, 141 N.W. 684, 688 (1913) the court stated:

> While it is true that under the [statute] . . . the consideration of any contract or agreement required by the statute to be in writing need not be set forth in the contract, *Yet the agreement itself must be in writing.* (Emphasis added.)

> you the opportunity to become one of our contemplated center's major tenants with rental and terms at least equal to that of any other major department store in the center.

City Stores' entire case requires transmuting "opportunity to become a tenant" into "option to become a tenant." Nothing in the English language justifies such a result.

The words "opportunity" and "option" are defined as follows in the recently published Random House dictionary:

> *Opportunity:* 1. an appropriate or favorable time or occasion. 2. a situation or condition favorable for attainment of a goal. 3. a good position, chance, or prospect for advancement.
>
> *Option:* 1. the power or right of choosing. 2. something that may be or is chosen; choice. 3. the act of choosing. 4. see stock option. 5. a privilege acquired, as by the payment of a premium or consideration, of demanding, within a specified time, the carrying out of a transaction upon stipulated terms; the right, as granted in a contract or by an initial payment, of acquiring something in the future.

Corbin in his treatise on Contracts specifically states that the word "opportunity" is not a synonym for the word "option." 1A Corbin, Contracts, § 261A, at 484 n. 23 (1963). The words have entirely different derivations. The word "option" is derived from the Latin root "*optare,*" meaning to choose. *Oxford Universal Dictionary,* p. 1378 (3d ed. 1955). By contrast, the word "opportunity" is derived from the Latin word "*opportunus,*" literally "made of *ob* and *portus,* at or before the harbor, [it] suggests the timely arrival of one's ship." Johnson, *Latin Words of Common English,* p. 236 (1931).

As the court said in *Reno Club* v. *Young Investment Co.,* 64 Nev. 312, 182 P.2d 1011, 173 ALR 1145, 1152 (1948):

"In the absence of clear evidence of a different intention, words must be presumed to have been used in their ordinary sense and given the meaning usually and ordinarily attributed to them."

The builders demonstrated at the trial that City Stores' own officers and attorneys have used the very same language as that in the undated letter to convey the meaning of a *chance*, rather than an *option*, to become a tenant. Thus, paragraph 9(n) of the Amended Complaint in this very case, unconsciously employing the critical language of the undated letter (and alleged oral contract) almost verbatim, alleged as follows:*

> The Rouse-Reynolds application for shopping center rezoning was denied on July 25, 1962, in part due to plaintiff's assistance, thus assuring that the shopping center project on the Gudelsky-Lerner Tract would enjoy a position of great value and enhancing the prospects for its success, and also *assuring that there would be no opportunity for Lansburgh's to lease a department store on the Rouse-Reynolds Tract.* (Emphasis added.)

City Stores admitted that the above-quoted language referred to a lessening of Lansburgh's "*chances* of obtaining a lease from Messrs. Rouse and Reynolds had they received favorable zoning action" rather than to the loss of an "option for a lease" on the Rouse-Reynolds tract.[100] Therefore, it surely cannot be said that virtually the same language in the undated letter and oral contract necessarily meant "option for a lease."

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[100] Ans. to Defendants' Interrogatory 15(b), 6 13 66, F. 518. (Emphasis supplied.)

* For other examples of usage by City Stores itself which shows that the natural meaning of "opportunity" is "chance" not "option," see PX-I, pp. 23, 29-30, F. 1130, 1136-37; PX-G, white tab 31, F. 346; PX-H, p. 31, F. 1213; PX-A, p. 9, F. 1003; Plaintiff's Jan. 14, 1966 Memorandum in this case, pp. 8, 18-19, F. 439, 442-42A; Plaintiff's March 22, 1966 Memorandum, p. 78, F. 493.

II. THE COURT BELOW ERRED AS A MATTER OF LAW IN HOLDING THAT THE RULE "THAT WHERE MATERIAL TERMS REMAIN TO BE DECIDED BY THE PARTIES, THERE IS NO CONTRACT AT ALL, LET ALONE ONE THAT CAN BE SPECIFICALLY ENFORCED . . . HAS NO APPLICABILITY TO OPTIONS."

1. *The Error of Law Made by the Court Below.*

The district court found that the parties had left "substantial terms open for future negotiation,"[101] but held that the parties had nonetheless entered into a complete contract because the rule "that where material terms remain to be decided by the parties, there is no contract, let alone one that can be specifically enforced . . . has no applicability to options."[102] The result of this error of law is that the court converted what were at most preliminary negotiations into a completed contract, imposing upon the builders obligations to which they never agreed. There is no rule of law, and the court below cited no authority therefor, to the effect that option contracts are enforceable notwithstanding the omission of material terms requiring negotiation. On the contrary, as the court stated in *Reno Club v. Young Investment Co.*, 64 Nev. 312, 182 P.2d 1011, 173 ALR 1145, 1156 (1948):

> The authorities very generally, we believe, adhere to the rule that when in the option agreement, or in the negotiations of the parties, there appears the intention that further negotiation shall be had as to the terms of the proposed lease,—that there remain questions as to terms and provisions yet to be settled in the future negotiations as contemplated, then and in that event, the proposed lease is incomplete and not yet sufficiently

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[101] Op., App. C, p. 23a, *post*.

[102] Op., App. C, pp. 18a-19a, *post*.

developed upon which to establish the basis of a decree of specific performance.

On the other hand, many authorities take the view that if the option for a lease contains all the essential terms of a simple, ordinary lease, that is to say, the names of the parties, a description of the property to be leased, the amount of rental, when same is payable, and the term or duration of the lease, and does not indicate any expectation of further provisions to be thereafter negotiated, same is sufficiently complete to constitute a binding contract, and to serve as a basis for specific performance,—that the usual, ordinary covenants and provisions of leases in the community or vicinity where the property is situated are deemed contemplated by the parties, and further negotiations are unnecessary.

In *Lahaina-Maui Corp.* v. *Tau Tet Hew*, 362 F.2d 419, 422, 425 (9th Cir. 1966), the court stated:

> The principles to be applied in determining whether the "Option to Lease" lacked the requisite certainty for enforcement are stated in *Francone* v. *McClay*, 41 Haw. 72, 78:
>
> > There is little or no conflict of authority upon the general principle that where a contract is complete and certain as to the essential and material terms, parts and elements of a lease, specific performance will be granted; nor if the contract to lease or the negotiations of the parties affirmatively disclose or indicate that *further* negotiations, terms and conditions are contemplated, the proposed lease is considered incomplete and incapable of being specifically enforced. (Emphasis in original.)
>
> * * * * *
>
> The result is that the "Option to Lease" is burdened with a material provision the terms of which, as has been established, are indefinite because they are left to

> future negotiations. If an option agreement provides for inclusion of material provisions in the contract contemplated by the exercise of the option, the option agreement should define the terms of the provisions with reasonable precision. If they are tainted with such vagueness and ambiguity that it might be reasonably expected that substantial disagreement as to precise terms may arise upon attempted exercise of the option, as it has arisen here, then no enforceable option agreement has been made.

See also Annotation: *Specific Performance of Written Executory Contract for Lease of Real Property*, 173 ALR 1161 (1948). As these authorities establish, an option for a lease cannot be enforced if it lacks material terms requiring negotiation.

2. *The Undated Letter Is Not an Enforceable Option for a Lease; at Most It Is an Agreement Only in Principle in That Material Matters Remain to Be Negotiated.*

The error of law referred to above caused the district court to ignore the legal implications of its own findings as to the need for further negotiations. The court found in part (App. C, p. 23a, *post*):

> It is not contested by the plaintiff that if it were to accept a lease tendered by defendants in accordance with the contract, there would be numerous complex details left to be worked out. The crucial elements of rate of rental and the amount of space can readily be determined from the Hecht and Woodward & Lothrop leases. But some details of design, construction and price of the building to be occupied by plaintiff at Tyson's Corner would have to be agreed to by the parties, subject to further negotiation and tempered only by the promise of equal terms with other tenants. The

> question is whether a court of equity will grant specific performance of a contract which has left such substantial terms open for future negotiation.

Consequently, under the court's own finding, there can be no doubt that further negotiations were contemplated and that, accordingly, no legal obligation arose from the undated letter. The applicable rule is stated as follows in Williston, Contracts, § 45 (3d ed. 1957):

> Although a promise may be sufficiently definite when it contains an option given to the promisor or promisee, yet if an essential element is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement. Since either party by the very terms of the promise may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise.

Many cases reflect this rule. *E.g., Saxon Theater Corp.* v. *Sage*, 347 Mass. 662, 200 N.E.2d 241 (1964); *Nash* v. *Conatser*, 410 S.W.2d 512 (Tex. Civ. App. 1966); *Joseph* v. *Doraty*, 144 N.E.2d 111 (Ohio App. 1957); *Dan Cohen Realty Co.* v. *National Savings & Trust Co.*, 125 F.2d 288, 289 (6th Cir. 1942); *Kaufmann* v. *Lennox*, 265 Mass. 487, 164 N.E. 450 (1929); *Scholtz* v. *Northwestern Mutual Life Ins. Co.*, 100 F. 573 (8th Cir. 1900); *Mayer* v. *McCreery*, 119 N.Y. 434, 23 N.E. 1045 (1890). See also Pomeroy, Specific Performance § 86 (3d ed. 1926).

There are well-established criteria for determining whether initial communications, such as those upon which City Stores seeks to rely, constitute a binding contract or whether the parties reserved essential elements for future determination to be set forth in a fully expressed written agreement. See Annotation: *Formal or Written Instrument as Essential to Completed Contract Where the Mak-*

ing of Such Instrument Is Contemplated by Parties to Verbal or Informal Agreement. 122 ALR 1217-1277 (1939).* See also 1 Corbin, Contracts, § 30 (1963 ed.):

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* City Stores' own recognition of the need for further negotiation is shown by:

(i) Its telegram to the builders of July 14, 1965 (Exh. N to the Complaint, F. 436) stated: "imperative you advise us by telegram within twenty-four hours *whether you intend to negotiate department store lease with us at Tysons Corner or not.*" The telegram concluded by stating that unless an affirmative response was received plaintiff intended to institute appropriate legal action immediately "to compel you to do so." Clearly, City Stores wanted to compel *negotiations.*

(ii) The testimony of City Stores' real estate counsel, which shows that it is City Stores' normal practice to engage in lengthy, detailed negotiations prior to signing a letter of intent, which letter becomes the basis for further negotiations prior to the execution of a lease.

Mr. Zipin testified as follows (Zipin Dep. (PX-K), pp. 7-8, F. 1152-53):

Q. Mr. Zipin, for what purpose is City Stores organization using letters of intent in the regular course of its business?

A. We consider them very important, because even though they are—the terms of the arrangement are usually spelled out, and they are subject to a final lease to be drawn, I would say in all my experience here it's been almost unanimous that these letters of intent resolve themselves into a finished document and arrangement, and so at the time that we are committing ourselves with respect to a site, or store, and the arrangement of terms with respect to it, the letter of intent at least gives us, in our opinion, something that is binding from which flows a tremendous amount of effort and work, studies, sometimes before, but certainly after, many meetings of the executives, management, to the chairman, all the details with respect to the store, construction, layout, oh, even the color of stone and tile; and the planning that has to go into it at the store level.

In other words, the letter of intent starts us going for a long period of time and much effort and expenditure of time and money.

Q. Is it generally an expensive proposition to negotiate a final department store lease after a letter of intent has been signed?

A. You said to negotiate. Do you mean my effort to negotiate?

Q. The effort of City Stores.

A. Yes, it would be.

Q. And is that frequently a time consuming procedure?

A. Yes, it is.

> The greater the complexity and importance of the transaction, the more likely it is that the informal communications are intended to be preliminary only.

And see *Ginsberg Machine Co.* v. *J.H. Label Processing Corp.*, 341 F.2d 828 (2d Cir. 1965); *Stone Properties* v. *Neal*, 164 P.2d 38, 41 (Calif. 1945); *Upsal Street Realty Co.* v. *Rubin*, 326 Pa. 327, 192 A. 481 (1937).

Applying the established facts to the undated letter, the letter is clearly not a completed contract in that (a) construction contract and lease agreements, like those involved here, are lengthy, complex documents which must be painstakingly negotiated;[103] and (b) a contract contemplating the design, construction and long-term leasing of a large store building in a regional shopping center is certainly an unusual contract in that it must be negotiated with reference to the requirements of the particular tenant as well as of the center as a whole.[104]

The undated letter is not even a letter of intent. A copy of the letter of intent which the builders executed with Woodward & Lothrop and the Hecht Company has been attached to this brief as Appendix I so that it may conveniently be compared with the undated letter. Despite its formality, the solemnity of its execution, and breadth of detail covered, the letter explicitly recognizes the need for negotiating a definitive lease agreement and predicates a *binding* obligation upon the consummation of such negotiations.[105] The Lansburgh's-Tysons Corner negotiations never reached even this preliminary stage.

In *Saxon Theater Corp.* v. *Sage*, 347 Mass. 662, 200 N.E.2d 241, 244 (1964), the court rejected a claim that defendant

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[103] Zipin Dep. (PX-K), pp. 7-8, F. 1152-53.

[104] Tr. 105, 574, 614, 718, 800, F. 1568, 1686A, 1705, 1764, 1784.

[105] See also Zipin Dep. (PX-K), pp. 7-8, F. 1152-53.

had agreed to build and lease a theater for plaintiff, on the ground that the terms of the alleged agreement were "uncertain in many material respects." A letter signed by defendant expressing the parties' "mutual intent" included many details of the lease, but did not recite the precise boundaries of the land to be leased, the rental for the last 10 years of the 30-year term, or the "basic plans and specifications" for the building. In holding that the parties "had reached the stage of imperfect negotiations" only, the court said:

> The representation of an intention to build a theatre and give a long term lease to the plaintiff is no more than an offer to negotiate. The court said in *Rosenfeld* v. *United States Trust Co.* [290 Mass. 210, 216, 195 N.E. 323, 325 (1935)]: "Normally the fact that parties contemplate the execution of a final written agreement justifies a strong inference that the parties do not intend to be bound by earlier negotiations or agreements until the final terms are settled."
>
> We are of opinion that the plaintiff could not reasonably rely on a representation of an intention to draw up and execute a mutually acceptable lease when essential terms of it had not yet been stated or settled. The proposed lease would involve detailed negotiations and it might turn out that no lease acceptable to the parties could be worked out.

3. *The Court Below Erred in Concluding That the Rule That Usual and Ordinary Covenants of Leases Are Assumed to Have Been Agreed Upon Permits a Court to Supply Substantial Terms Which Must Be Negotiated.*

The district court cited *Walsh* v. *Rundlette*, 9 D.C. 114 (S.Ct. D.C. 1875) for the proposition that specific performance would not be refused merely because of the absence "of such covenants as are usual and incident to leases of

the same kind. . . ." The justification for this rule, however, is not that the court is privileged to make a contract for the parties, but that "the usual ordinary covenants and provisions of leases in the community or vicinity where the property is situated are deemed contemplated by the parties and further negotiations are unnecessary." *Reno Club* v. *Young Investment Co.*, *supra* at 1156. A court "cannot substitute a contract of its own making for that of the parties." *Crowell* v. *Gould*, 68 App. D.C. 297, 96 F.2d 569, 572 (1938). As the Court of Chancery of New Jersey in *Zukman* v. *Ihle*, 99 N.J.E. 702, 133 A. 779, 780 (1926), *aff'd on the opinion*, 135 A. 920 (1927), stated:

> • • • Any attempt to comply with the prayer of the bill would not result in compelling the defendant to abide by his bargain, because he never completed one. It would be a demise by the court of his land for a considerable term upon conditions imposed by the court. This would be intolerable.

In this case, the court's Order of Specific Performance specifically enforces not the alleged option, but the "resulting bi-lateral agreement," a lease which in the court's view contains terms "equal" to those contained in the Hecht lease. To accomplish this purpose, the Order directs the builders to execute a construction contract and lease agreement attached to the Order. The construction contract and lease agreement is 144 pages long, not counting exhibits. Attached to the lease is a First Amendment of 11 pages and a Supplemental Lease Agreement of 24 pages, both of which are also to be executed. (F. 1-302.)

The construction contract and lease agreement attached to the Order is not an agreement the parties prepared or negotiated. It is the Hecht construction contract and lease agreement[106] unilaterally rewritten and modified by City

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[106] PX-E, white tab 8.

Stores and attached to the Order by the court. As pointed out below in more detail, City Stores' modifications of the Hecht lease impose obligations on the builders to which they never agreed and which find no counterpart in the Hecht lease.

The district court concluded that the "promise of equal terms" provided a standard which would "make design and approval of plaintiff's store a fairly simple matter, if the parties deal with each other in good faith and expeditiously" as the court stated it would thereafter order.[107] However, the standard of "equality" to the Hecht lease has no such specific content. Had the Order used the word "identical" rather than "equal" the obligations imposed would have been sufficiently specific. That could not be done, however, for various reasons, including the fact that the site for the third store building has its own topographical requirements. But once an identical or even substantially identical building is impossible, an "equality" standard is not a sufficiently meaningful measure for the parties' performance. For what is an "equal" building?

The court relied on Article VIII, § 8.1(g) of the Hecht lease, which specifies that ~~the quality of construction of the Mall shall be comparable to~~ the quality and design, "the decor and the treatment values, approach and standards of the Enclosed Mall shall be comparable, at minimum," to the Mall at "Topanga Plaza Shopping Center, Los Angeles" for the conclusion that a specifically enforceable standard of equality exists with respect to the department store buildings.[108] The quoted provision, however, does not even relate to the department store buildings; it relates to the Mall structures. Further-

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[107] Op., App. C, pp. 23a, 31a, *post*.

[108] Op., App. C, pp. 31a-32a, *post*.

more, the mere fact that such a provision is in a contract is no proof that that provision is sufficiently certain to be specifically enforced.

The Hecht and Woodward & Lothrop letters of intent contemplated leases "similar as possible."[109] Yet, in recognition of the differences between the images of the two stores, the Woodward & Lothrop store will cost the builders an estimated $300,000 more than the Hecht store.[110] The standard of equality here plainly has no sufficiently precise meaning to permit of specific enforcement.

The court also found that "the fact that buildings are being built by defendants for Hecht and Woodward & Lothrop and that they are of different exterior and interior design is proof (if any were needed) that the same lease is equally adaptable to a third and yet different store building."[111] Again, however, proof that Woodward & Lothrop, the Hecht Company, and the builders were able to negotiate with one another pursuant to this standard in an amicable atmosphere is not proof that a court could have ordered specific performance under that standard.

In any event, the construction contract and lease agreement attached to the court's Order is not an "equal" agreement for the following reasons:

1. Article IX of the contract (F. 48-54) requires that the builders construct a department store building for Lansburgh's at the builders' expense in accordance with schematic drawings, appearing as Exhibit J to the lease (F. 295-300), and in accordance with specifications appearing in Exhibit D (F. 202-06). Under the terms of the construction contract and lease attached to the Order, City Stores has 30 days to supply a new Exhibit J, which is a render-

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[109] App. I, p. 46a, *post*.

[110] Tr. 452, 455, 817, F. 1667, 1668, 1801.

[111] Supp. Op., App. D, p. 39a, *post*.

ing of the external appearance of the store. In the case of the Hecht and Woodward & Lothrop buildings, however, the builders did not execute the construction contract and lease agreement until after they had spent months examining detailed construction drawings submitted by each of those then prospective tenants.[112] There is no provision in the form of Order and construction contract and lease agreement attached thereto requiring City Stores to submit for the builders' appraisal construction drawings with detail equivalent to those submitted by Hecht and Woodward & Lothrop before they are required to construct the building. The Order therefore imposes the *unequal* obligation on the builders to prepare detailed construction drawings equivalent to Exhibit DX-R. Furthermore, the builders' architects testified that each department store building is custom-made to fit the particular store's mode of operation, and that they are not qualified and do not know how to unilaterally design and make detailed construction plans for a Lansburgh's store.[113]

2. No provision in the construction contract and lease agreement attached to the court's Order indicates what the cost of the Lansburgh's building is to be, though the court stated in its Supplemental Opinion (App. D, p. 39a, *post*) that the cost should be substantially the same as the Hecht building. The Woodward & Lothrop building was estimated to cost $15 a square foot and the Hecht building $13 a square foot in recognition of the fact that Woodward & Lothrop generally caters to higher price lines and that the appearance of the building should reflect the "image" of the store.[114] Consequently, it is improper to assume that the

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[112] Tr. 634-35, 800, 809, F. 1711-12, 1784, 1793; DX-R.

[113] June 2, 1967 Hearing, pp. 36-39, 46, F. 1804-07, 1814.

[114] Tr. 615, F. 1706; note 110, *supra*.

builders would not have demanded a lower cost for the Lansburgh's store in recognition of its lower price lines and image.[115]

Even more important, the builders are not required to build for the Hecht Company and Woodward & Lothrop buildings of particular costs, but of particular designs, which the builders agreed to build only after estimating what such buildings would cost from the construction drawings and the negotiations thereon.[116]

Suppose that the builders' architects come up with plans for a building they say will cost as much as the Hecht building but which Lansburgh's claims will cost less and is therefore in violation of the court's Order? We think only a moment's consideration is required for the conclusion that detailed construction plans, and an agreement on what the resultant building will cost must come before, not after, a construction contract is signed.

Mr. Chelouche, one of the builders' architects, testified that the detailed drawings which the Hecht Company submitted[117] before that construction contract and lease was signed played a very important role in permitting the builders to estimate the cost of construction.[118]

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[115] Tr. 615, 738, 740, F. 1706, 1772, 1774.

[116] June 2, 1967 Hearing, p. 51, F. 1819; see note 112, *supra*.

[117] DX-R.

[118] Mr. Chelouche testified as follows:

Q. Now, Mr. Chelouche, would you explain how the drawings referred to as Defendants' Exhibit R were used in determining the cost of The Hecht Store for Tysons Corner by the architects?

A. Well, the architect usually, if he gets just outline specifications it's much more difficult to determine the cost of the building because there is a lot of leeway. There is a lot of negotiation which is supposed to go between the department store and the architect, but having seen this set of drawings it is made much easier for the architect to estimate the cost of the building.

(footnote continued on next page)

3. The court's Order does not take into account the fact that because of the topography of the Tysons Corner tract the store that City Stores demands is one which will have one full floor of selling space—75,000 square feet—completely underground.[1] Neither the Woodward & Lothrop nor Hecht stores has a selling floor completely underground and the construction contract and lease agreement makes no provision for the design, construction and excavation problems created by this requirement.

III. THE COURT BELOW ERRED AS A MATTER OF LAW IN DECREEING SPECIFIC PERFORMANCE OF AN ALLEGED AGREEMENT THE SOLE CONSIDERATION FOR WHICH WAS AN ATTEMPT TO INFLUENCE THE DECISION OF A PUBLIC BODY.

In *Hazelton* v. *Sheckels*, 202 U.S. 71 (1906), the Supreme Court held that specific performance will not be decreed of an agreement affecting real property where part of the consideration is an attempt to influence a legislative judgment. *Hazelton* involved an appeal from this Court and clearly establishes the law in this jurisdiction. The rule enunciated is based upon important public policy and the well recognized proposition that a suitor in equity must have clean hands.

In *Hazelton* Mr. Justice Holmes, speaking for a unanimous Court, declared void a "contract for a contingent compensation for obtaining legislation." The suit sought

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Q. And were these drawings, Exhibit R, reviewed and studied by the architect prior to the time the Hecht lease was signed?

A. Extensively, every inch of detail. Tr. 800, F. 1784; see also June 2, 1967 Hearing, p. 51, F. 1819.

[1] Defendant's Objections to Form of Order, ¶ 15, F. 519-20; Plaintiff's Reply to Defendant's Objections, ¶ 15, F. 521-22.

specific performance of a contract for the sale of land for $9,000 and the purchaser's services in persuading Congress that the property was a "suitable and appropriate site for a hall of records." Congress was persuaded by the plaintiff to pay $14,395 for the tract. Even though the contract provided for $9,000 to be paid as the balance of the consideration, Mr. Justice Holmes declared that it could not be enforced because another part of the consideration was an effort to influence a legislative decision. It made no difference that the buyer's activities before Congress were wholly legal; the Court refused to inquire into what was actually done. Mr. Justice Holmes stated for a unanimous court:

> We assume that [the activity before Congress was] legitimate, but the validity of the contract depends on the nature of the original offer, and, whatever their form, the tendency of such offers is the same. The objection to them rests in their tendency, not in what was done in the particular case. Therefore a court will not be governed by the technical argument that when the offer became binding it was cut down to what was done, and was harmless. The court will not inquire what was done. If that should be improper, it probably would be hidden, and would not appear. In its inception, the offer, however intended, necessarily invited and tended to induce improper solicitations . . . .

The Court found that the dangers inherent in such contracts were intensified when the reward for the attempts to influence a legislative decision was contingent upon the influence bearing fruit.

The similarity between the *Hazelton* case and the facts alleged herein by City Stores is striking. City Stores alleged, particularly in 9(g) of the Amended Complaint, that *after* it indicated its preference for the Lerner-Gudelsky tract over the Rouse-Reynolds tract "Isadore Gudelsky

and defendant Lerner requested Plaintiff's assistance in regard to their zoning problems." Paragraph 9(h) then alleges that "at the time of making such request Isadore Gudelsky and defendant Lerner orally agreed with plaintiff that if it would render such assistance and if the application for rezoning should be successful, they would give Lansburgh's the opportunity to become one of the major tenants of the Tysons Corner shopping center with rental and terms at least equal to that of any other major department stores in the center."

The Complaint continues, in paragraph 9(i), "In reliance on this agreement, plaintiff rendered extensive and important assistance in securing favorable action by the Fairfax County Board of Supervisors on the pending rezoning application of Isadore Gudelsky and defendant Lerner. As part of the assistance so rendered, Plaintiff furnished to Defendant a letter dated May 29, 1962, . . . for filing in the rezoning proceeding."

The district court in its Opinion found that the quid pro quo for the promise "to give Lansburgh's an opportunity to become a major tenant at the Tyson's Corner center . . ." was "assistance from Lansburgh's in securing the necessary zoning for the tract."[120] Consequently, it is clear that the *Hazelton* rule completely precludes specific performance of the alleged agreement, without inquiry into what Lansburgh's actually did, or whether it succumbed to the evils which the doctrine is designed to prevent. The current vitality of the *Hazelton* doctrine is well recognized. See, *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 550 (1961); *LeJohn Mfg. Co.* v. *Webb*, 95 App. D.C. 358, 222 F.2d 48, 51 (1955). There is nothing in the *Hazelton* rule to limit its application to Congress to the exclusion of local governments.

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[120] Op., App. C, p. 14a, *post*.

Though, in view of *Hazelton*, it is not necessary for the Court to reach the point, the "unclean hands" doctrine makes it important to note that Mr. Jagels' letter of May 29, 1962, which was written to be shown to and used by the Fairfax County Board,[121] was materially false. In the opening paragraph of that letter, Mr. Jagels said:

> In view of our several discussions on the Tyson's Corner area as a place for a Regional Shopping Center, I am pleased to say that we have now completed our rather exhaustive surveys and are in a position to give you our firm position on the subject.
>
> We are convnced that the Gudelsky-Lerner tract, to which you refer as the Tysons Triangle, is superior to any other.

City Stores at first asserted in this action that the "rather exhaustive surveys" (which Mr. Lerner never saw)[122] were the 1961 and 1962 studies published by City Stores' research staff.

> Additionally, Lansburgh's, as the May 29, 1962 letter states, had concluded a number of extensive surveys of the area (Defendants' Exhs. 1, 16)* so that it was in a position to make a meaningful statement as to why it favored the Gudelsky-Lerner tract and back that statement up with testimony, if necessary."[123]

When, however, examination of these two surveys revealed that they did not even mention either tract and contained no information which could provide a basis for judging the comparative merits of the two tracts,** City Stores

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[121] See note 33 *supra*.

[122] Tr. 83, F. 1557.

[123] Plaintiff's March 22, 1966 memorandum, p. 40, F. 492.

* Now designated PX-G, white tabs 1, 16, F. 303-25.

** The head of the City Stores research organization which made the economic surveys testified that they were not asked to compare particular sites, did not in fact compare any particular sites and

that the "rather exhaustive surveys" referred to in the May 29, 1962 letter were not the published studies, but were rather the personal visits of Mr. Jagels and other officials inspecting the two sites. Thus, Mr. Jagels testified at the preliminary injunction hearing:[124]

> Q. Now, I believe you made reference to certain studies that Lansburghs had prepared with respect to the superiority of the so-called Lerner Gudelsky tract over the Rouse Reynolds tract.
>
> Are those the economic studies that were shown to you on your deposition?
>
> A. They are not.
>
> Q. What studies are those?
>
> A. These were local studies or—I assigned certain of our executives to visit the property to examine it. I made several trips myself by automobile to examine the two pieces of property to try to make up my own mind as to what I thought of the two pieces.

On a subsequent deposition, however, Mr. Jagels said that what he had been relying upon was not his own personal visits, but rather the information given him by another Lansburgh's official, Mr. Neugass. Mr. Jagels testified as follows:[125]

> Q. Do you recall whether you drove on the Beltway when you visited the Tysons Corner area prior to writing this letter, if you did visit it prior to that time?
>
> A. I don't recall. I might say that I relied very strongly on the information given to me by my Vice-President.

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indeed did not even feel capable of shedding any light on which of two adjacent tracts would be better for a regional shopping center. Pass Dep. (PX-S), pp. 12, 30, F. 1323A, 1327.

[124] PX-B, p. 29, F. 1273.

[125] Jagels Dep. (PX-R), p. 44, F. 1433.

Q. Mr. Neugass?

A. Mr. Neugass who had been a resident of the Washington area for many years. And I was a relative newcomer.

Q. Was it Mr. Neugass who advised you that the Gudelsky-Lerner tract was located on the Beltway?

A. *Yes, sir. It was he who advised me that he thought this was a better location than the Rouse tract.*

Mr. Neugass, however, admitted on his deposition: "I did not study the Rouse-Reynolds site." [126] Indeed, he had not even physically inspected the Rouse-Reynolds tract.[127] Furthermore, Mr. Neugass testified that Mr. Jagels had explicitly instructed him to confine his inspection to the Lerner-Gudelsky tract.[128]

Finally, City Stores has claimed that what was valuable to the builders was not simply the letter itself, but that Lansburgh's "was in a position to make a meaningful statement as to why it favored the Gudelsky-Lerner tract and back that statement up with testimony, if necessary." [129] The "expert" it sent to the hearing, however, was not Mr. Jagels, who had left the city for a college reunion,[130] but Mr. Neugass, who did not inspect or study the Rouse-Reynolds tract at all.[131]

It does not matter that the Fairfax County Board did not rely on Mr. Jagels' letter. What does matter, so far as equitable relief is concerned, is that a deliberately false claim of expertise was made for the purpose of affecting a

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[126] Neugass Dep. (PX-N), p. 15, F. 1109.

[127] Neugass Dep. (PX-Z), p. 15, F. 1499.

[128] Id., pp. 17-18, F. 1501-02.

[129] City Stores' March 22, 1966 Memorandum, p. 40, F. 492.

[130] See note, pp. 31-32, *supra*.

[131] Neugass Dep. (PX-N), pp. 9-10, F. 1106-07.

zoning decision, a matter going to the heart of this lawsuit. City Stores has unclean hands.

IV. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN HOLDING THAT LANSBURGH'S WAS NOT ESTOPPED BY LACHES.

The district court rejected the builders' defense that City Stores was estopped from equitable relief by its *laches* because City Stores had not received consideration to *release* its claim. Whatever may be the law of "release," the builders maintained below not that City Stores released or waived its claim, but that it was guilty of "laches". As a matter of law "consideration" is irrelevant to the defense of laches. The district court also erred in holding that City Stores could not have sued in May, 1964, when it was advised that the builders denied any legal obligation to it.

These two points, both of them resting on clear errors of law, comprise the district court's response to the builders' claim that City Stores, as a plaintiff in equity, was estopped by laches from recovery. The court should instead have been concerned over whether City Stores exercised the required degree of diligence, which is measured not by the amount of time that has elapsed, but by the effect of City Stores' delay on the builders. *Pretlow* v. *Pretlow*, 177 Va. 524, 14 S.E.2d 381 (1941). The Supreme Court in *Patterson* v. *Hewitt*, 195 U.S. 309, 319 (1904), stated: "In some cases the diligence required is measured by months rather than years." *Accord, Mandeville and Thompson, Inc.* v. *Danciger Oil & Refining Co.*, 62 F.2d 130 (5th Cir. 1932);* *Dry* v.

* Estoppel by laches operates as a defense independent of the statute of limitations, and may bar a suit in equity which the statute would not bar in law. *Patterson* v. *Hewitt*, 195 U.S. 309 (1904). "Traditionally and for good reasons, statutes of limitations are not controlling measures of equitable relief." *Holmberg* v. *Armbrecht*,

Rice, 147 Va. 460, 137 S.E. 473 (1927); *Emkey* v. *Siegel*, 192 Md. 571, 64 A.2d 561 (1949).

The facts which show that City Stores' delay prejudiced the builders are undisputed. (See pp. 15-17, *supra*.) On April 10, 1964, they advised Mr. Jagels that Lansburgh's could not be accommodated at the new shopping center. In a registered letter, Lansburgh's asserted that the builders had a legal obligation to Lansburgh's. The builders' response, a letter dated May 28, 1964, advised Lansburgh's as follows:

> We have heretofore advised you on more than one occasion that the executors of the estate of Isadore Gudelsky and Mr. Lerner do not consider that the letter referred to by you as a "binding obligation" is such in fact or as a matter of law.

This was a complete and unequivocal repudiation of the alleged agreement* and Lansburgh's thereafter acted at its peril not only in failing to file suit with dispatch, but in taking steps which indicated that it would not sue at all.

City Stores did not even respond to the May 28 letter. Its next communication to defendants was a friendly letter from Mr. Jagels dated September 3, 1964, expressing an interest in sitting down with defendants "to review the cur-

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327 U.S. 392, 396 (1946). The "good reasons" are that delay in a suit for damages can in itself cause no harm to defendant, but since the remedy in a suit for equitable relief acts on facts as they stand at the time of the suit, defendant may suffer unnecessary harm *solely* by virtue of plaintiff's choice of a late time to sue.

* In *Nasclli* v. *Millholland*, 89 F. Supp. 943 (D.D.C. 1950) (an attempt to assert rights under an alleged trust), the Court stated:

> After the trustee's death, when the plaintiff made a claim against the defendant, the defendant stated that she was not "aware of any subsisting trust agreement" and that she would obtain counsel. . . . Here was an unequivocal repudiation of the alleged trust. *Id.* at 947.

rent situation at Tyson's Corner and to discuss with you lease terms, opening dates, etc." The substance, language and style of this letter, which came four months after the formal exchange of letters claiming and rejecting a legal claim concerning a lease, certainly indicated that City Stores would like to negotiate, but was no longer claiming that the builders were under a binding obligation. Mr. Lerner testified that he had been "relieved" to receive this letter.[132]

Thereafter, intensive negotiations with the Hecht Company and Woodward & Lothrop took place, culminating in letters of intent jointly executed with both stores in April of 1965.* These negotiations would have been conducted differently had the builders known that Lansburgh's was still asserting its claim. A rental formula composed of a different combination of minimum and percentage rent would have been used to account for the fact that Lansburgh's anticipated sales volume was substantially less than that anticipated for the Hecht Company and Woodward & Lothrop.**

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[132] Tr. 177, F. 1622.

* The record shows that, while the letters of intent were not legally binding, they were the product of long negotiations, and, were the builders to have thereafter demanded a change in their terms, they would have seriously prejudiced their business reputation and ability to negotiate these leases as well as future leases. Tr. 152-53, 177, 612, 717, F. 1602-03, 1622, 1703, 1763; Zipin Dep. (PX-K), pp. 7-8, F. 1152-53.

** In negotiating the rental terms in letters of intent for major department store leases, the landlord takes principally into account the estimated volume of business that he believes will be done by the tenant. This is so because the landlord derives his profits not from the minimum rent charge, but from the rent charges over the minimum which are based on percentages of the gross volume of business done. Defendants estimated that Hecht's and Woodward & Lothrop would each do approximately $15 million per year at Tysons Corner. The minimum rent and percentage rent provisions contained

Had the builders known that City Stores would have second thoughts one year after acquiescing in the builders' repudiation of its claim, they might well have been able to keep open the possibility of a four-store center so the extraordinary commercial advantages of having a Sears store in the center[133] would not be lost.

Consequently, by virtue of the errors of law referred to above, the district court excluded from consideration the defense of laches which if properly considered would require dismissal of the complaint.

1. *The District Court Erred in Holding That Lansburgh's Could Not Have Sued to Vindicate Its Rights in 1964.*

The district court erred in reaching the following legal conclusion: "Plaintiff could not have brought an action for anticipatory breach because of the impossibility of assessing damages; it certainly could not have brought an action for specific performance because as yet there was no specifically enforceable contract right."[134] The courts have con-

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in the letter of intent are identical with those set forth in the executed leases. Tr. 165-70, 211-12, 546, F. 1610-15, 1631-32, 1686B.

Under the lease provisions, no percentage rent is payable unless the store does an excess of $11,000,000 per year. Based on the builders' expectations concerning the comparative gross volume of business to be done by the Hecht Co., Woodward & Lothrop, and Lansburgh's, the rental for Lansburgh's, were it to have the identical rent formula contained in the Hecht and Woodward & Lothrop leases, would be approximately $250,000 per year whereas the rent for Hecht's and Woody's would be approximately $320,000. Tr. 170-77, 211-12, F. 1615-22, 1631-32. This substantial difference in compensation to the builders for store buildings of the same size and cost should be compared with the district court's statement that "it must be conceded that as a practical business matter it is to the lessor's advantage that one tenant be given no distinct competitive advantage over another traceable to the terms of the leases entered into." Op., App. C, p. 17a, *post*.

[133] Tr. 156, 735-40, F. 1606, 1769-1774.

[134] Op., App. C, p. 34a, *post*.

sistently held that a suit for specific performance may be brought immediately upon the repudiation of the alleged agreement notwithstanding the fact that the time for performance has not yet arrived. E.g., *Dixon* v. *Anderson*, 252 F. 694 (4th Cir. 1918); *Tucker* v. *Conners*, 342 Mass. 376, 173 N.E.2d 619 (1961); *Grice* v. *Jones*, 33 App. D.C. 278, 283 (1909); *Bear* v. *Fletcher*, 252 Ill. 206, 96 N.E. 997 (1911); *Rittenhouse* v. *Sucicki*, 94 N.J.E. 36, 118 A. 261, 262 (1922); 49 Am. Jur. *Specific Performance* § 142, p. 165. Furthermore, the suit which City Stores eventually did file was in part a declaratory judgment action in which a judicial declaration was sought that it had a binding obligation from the builders. As the district court's Opinion points out (App. C, p. 35a, *post*), this suit was instituted before City Stores knew whether it wanted to exercise its "option." Clearly, the same relief could have been demanded after receipt of the builders' rejection of City Stores' claim on May 28, 1964.

The reason City Stores did not sue in 1964 was that it then believed that the builders were considering having four major stores at Tysons Corner, as was their unquestioned right,[35] and that, accordingly, the result of a successful suit might only be to gain entry into a four-store center, in which Lansburgh's was not interested. Thus, in 1964 Mr. Jagels informed City Stores' professional marketing consultant that "Lansburgh's [was] experiencing difficulty in getting into the [Tysons Corner] center in other than on a four-store basis"[36] and that the two things they could do if they could not get into the center was "forget the whole deal or file suit."[37] Mr. Jagels testified that in

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[35] PX-D, p. 79, F. 1315.

[36] Bohling Dep. (PX-T), p. 33, F. 1338.

[37] *Ibid.*, p. 40, F. 1342.

1964 he was opposed to a four-store center at Tysons Corner.[138] This same conclusion is reflected in paragraph 10 of the Amended Complaint which alleged that if Lansburgh's were offered a lease to become the fourth major department store at Tysons Corner "that lease would be of greatly reduced value [to Lansburgh's] in view of the increased competition at the Center" and that such action "would frustrate and largely nullify the value of [Lansburgh's] Option for a Lease . . . ."

Consequently, it is clear that City Stores decided to "forget the whole deal." * Its interests in Tysons Corner did not revive until June 2, 1965 when Mr. Frankel read in the newspaper that a three-store center was being planned.[139] Thereafter, on June 11, 1965, Lansburgh's claim was reasserted.[140]

2. *The District Court Erred, as a Matter of Law, in Ruling That Consideration Was Required for Lansburgh's Equitable Recovery to Be Barred.*

Estoppel by laches rests on plaintiff's unexcused delay coupled with prejudice to defendant; it has nothing to do with consideration or the other incidents of such legal doctrines as release and waiver. Regardless of the merits of his claim, "since he who seeks equity must do equity, the complainant must account for and explain any delay in bringing suit, and must show himself to have been ready,

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[138] Jagels Dep. (PX-H), p. 21, F. 1203.

[139] PX-G, white tab 2, F. 326-27.

[140] Exhibit J to the Complaint, F. 435.

* There was an economic incentive for Lansburgh's to take that route since Mr. Ammerman in his May 28, 1964 letter precluded simultaneous disputing with Lansburgh's over Tysons Corner and negotiating over other centers. Lansburgh's remained interested in appellants' proposed Oxon Hill (Riverside Plaza). PX-G, white tab 31, F. 349 (minutes for April 10, 1964); Melchior Dep. (PX-J), p. 17, F. 1176.

desirous, prompt and eager." *Emkey* v. *Siegel*, 192 Md. 571, 64 A.2d 561, 562 (1949).* The well established rule is stated as follows in 49 Am. Jur. § 75:

> Where one party to a contract gives notice to the other that he will not perform it, acquiescence therein by the other party by a comparatively brief delay in enforcing his rights by an appeal to the courts will be a bar to specific performance.

The district court's opinion contains not one word on the law and governing standards of estoppel by laches, even though this defense was raised and vigorously pressed by the builders at trial.

V. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN ORDERING SPECIFIC PERFORMANCE OF A CONSTRUCTION CONTRACT AND LEASE AGREEMENT WHERE SUBSTANTIAL TERMS ARE LEFT OPEN FOR FUTURE NEGOTIATION.

The district court said:

> It is not contested by the plaintiff that if it were to accept a lease tendered by defendants in accordance with the contract, there would be numerous complex details left to be worked out. The crucial elements of rate of rental and the amount of space can readily be determined from the Hecht and Woodward & Lothrop leases. But some details of design, construction and price of the building to be occupied by plaintiff at

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* The court refused to enforce a contract for sale of a house where suit was brought eight months after repudiation and four months after the date upon which the contract was to have been performed. "We think [plaintiff's] delay bars him from the remedy he seeks." 64 A.2d at 563. *Accord, Doering* v. *Fields*, 187 Md. 484, 50 A.2d 553 (1947); *Morris* v. *Wilson*, 187 Md. 217, 49 A.2d 458, 463 (1956); *Naselli* v. *Millholland*, 89 F. Supp. 943 (D.D.C. 1950).

> Tyson's Corner would have to be agreed to by the parties, subject to further negotiation and tempered only by the promise of equal terms with other tenants. The question is whether a court of equity will grant specific performance of a contract which has left such substantial terms open for future negotiation.[141]

The court concluded that an option contract requiring further negotiation on substantial terms could be specifically enforced at the court's discretion.[142]

The court stated in its Supplemental Memorandum that the builders "will be expected to construct for the plaintiff a building that costs substantially the same amount of money as that built for The Hecht Company" and that "the parties' architects can devise final designs from the potential combinations and variations of ideas at their disposal."[143]

The cost of the Hecht building, however, nowhere appears in the Hecht construction contract. The figure in the record of $13 per square foot was the standard which the Hecht Co. and the builders used in negotiating over the detailed construction drawings submitted by the Hecht Co. (and Woodward & Lothrop) *before* the construction contracts and lease agreements were signed.[144] The essence of those negotiations was whether a building erected according to such plans or modifications thereof *could* be built for $13 per square foot. No mechanism is provided in the Hecht Co. contract for settling differences in the parties' estimates of the costs involved. As has already been shown (pp. 50, 51 *supra*), it was only after those matters

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[141] Op., App. C, p. 23a, *post*.

[142] Op., App. C, p. 26a, *post*.

[143] Supp. Op., App. D, pp. 39a, 40a, *post*.

[144] See notes 116-18 *supra*.

were resolved that the builders executed that construction contract and lease agreement. In short, the $13 per square foot figure represented a standard for negotiation, not a standard defining the builder's obligation.

Consequently, the issue is clearly presented whether the builders may be required to execute a contract to build for Lansburgh's an entirely different building than the Hecht store according to plans not even in existence, with no assurance that the parties will be able to agree that a building erected pursuant to such plans will cost no more than the Hecht building.

The Order contains no provision implementing that portion of the court's Opinion which stated that if the parties are not able to agree on such matters as design and cost of the building that the court will appoint a master to settle their differences if they do not voluntarily agree to resort to arbitration.

It is necessary here to examine specifically what the court's Order requires in executing the construction contract lease attached to it. In Article IX(1) of the construction contract and lease agreement which appellants have been directed to execute, the builders agree

> without cost or expense to Tenant [Lansburgh's], to improve the Tenant Store Site by the construction thereon of the Tenant Store (the Tenant Store to include three structures or installations herein respectively referred to as the "Tenant Principal Building," the "Tenant TBA," and the "Tenant Auxiliary Installation"), . . . in conformity with the schematic drawings attached hereto as Exhibit J hereof and the specifications, a part of Exhibit D hereof. (F. 48).

When we turn to Exhibit J (F. 295-300), we do not find a drawing of the proposed Lansburgh's building. On the contrary, we find a drawing of the Hecht building. Indeed

Exhibit J says in paragraphs (2)(a) and (b) that within 30 days after execution of the lease, tenant [Lansburgh's] shall prepare and furnish to landlord:

> (1) a schematic drawing *equivalent* to the drawing labelled "Exhibit J" which shall show the exterior design of the East and South Elevations of Tenant's Principal Building, including, in the South Elevation, the front elevation of Tenant's Auxiliary Installation; and (2) a schematic drawing *equivalent* to "Exhibit J Proposed Tire Center" which shall show the exterior design of the front elevation of the Tenant TBA. Each of said exterior designs shall comply with the requirements of Sections VIII and IX and Exhibits B and D to the lease, *shall harmonize in design concept, quality of construction and materials, decor, color, and treatment, with the overall design of the shopping center, and shall be functionally and aesthetically equal to the exterior designs set forth in "Exhibit J" and "Exhibit J Proposed Tire Center,"* respectively. Tenant's Principal Building shall have the same height measured from the Mall Level as shown on Exhibit J for the May Store (43 feet). Each of said exterior designs shall include the name Lansburgh's as set forth in the drawing labelled "Lansburgh's Sign—Exhibit J" appropriately displayed on each elevation in a manner comparable to The Hecht Company name on "Exhibit J," and "Exhibit J Proposed Tire Center," respectively. The Tenant TBA shall also contain after the name "Lansburgh's" the words "Tire Center" in compatible lettering, and the Tenant Auxiliary Installation shall also contain after the name "Lansburgh's" the words "Garden Center" in compatible lettering.
>
> (b) Upon receipt of said schematic drawings by the Landlord, the Landlord, within 15 days thereafter, shall either approve said exterior designs in writing to the Tenant, which approval shall not be unreasonably withheld, in which event they shall become the binding exterior designs under this lease; or, *if Landlord reason-*

> *ably believes that said designs (or design) do not meet the requirements of paragraph (2)(a) above, Landlord shall notify the Tenant in writing as to the specific manner in which said designs (or design) fail to meet said requirements and how said designs (or design) may be* corrected for that purpose. Tenant, within 15 days, shall make all revisions, if any, necessary to meet said requirements, and Tenant shall furnish the schematic drawings as so revised to the Landlord, and they shall become Exhibit J to this lease superseding this Exhibit J. [Emphasis added.] F. 296-97.

Thus, Exhibit J to the Hecht lease simply depicts the buildings to be built. In contrast, Exhibit J to the construction contract attached to the court's order forces the builders to act at their peril should they fail to agree that City Stores' Exhibit J depicts a building "functionally and aesthetically equal" to the Hecht building, or that the builders can construct such a building at a cost equivalent to that of the Hecht Company building.

City Stores argues that Exhibit D of the Hecht Company construction contract (F. 202-06) obligates the builders to prepare architectural and structural drawings and to supply preliminary drawings to the Hecht Company 15 days after lease execution. However, the record shows that that provision could not have concerned the builders, since they in fact did not execute the contract until detailed construction plans were submitted by the Hecht Company and ~~only after~~ they were satisfied, following intensive negotiations over those drawings, that the building erected pursuant to those plans would cost them no more than $13 per square foot.[145]

The builders' architect also testified that the usual practice of his office is to be given a prototype to work from, and then, in cooperation with the store's store planning

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[145] See note 114 *supra*.

consultants, to develop a design which is submitted to the store for its approval. They have never designed a department store completely on their own and they "would not be qualified to do this." [146]

Furthermore, since the external appearance of a department store governs basic construction features of the building,[147] what the court's Order in effect does is to require the builders to devise construction plans implementing Lansburgh's vision of the store's exterior with no assurance that this is either possible or that it can be done within particular cost estimates.

The aforementioned Article IX of the lease specifies the use of Exhibit D to the Hecht lease *in haec verba*. Exhibit D, consisting in part of what are referred to in the trade as "outline specifications," [148] is a most important part of the construction contract, governing many of the building's design and equipment features. The builders' architect testified that since the proposed Lansburgh's store will not be a split-level building like Hecht's but will have a full basement underground* "it would be necessary to modify that outline specification substantially." [149] Similarly, Mr. Chelouche, another of the builders' architects, testified at the trial that Exhibit D could be applied to the third store site only by the elimination of the lower level.**

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[146] June 2, 1967 Hearing, pp. 45-46, F. 1813-14.

[147] Tr. 813, F. 1797.

[148] June 2, 1967 Hearing, p. 43, F. 1811.

[149] *Ibid.*, p. 45, F. 1813.

* The Exhibit J drawing of the building's external appearance which was supplied by Lansburgh's on August 1, 1967, confirms this point. It shows one floor completely underground.

** He testified on cross-examination as follows:

Q. I'm just talking about Exhibit D and nothing else. I am not getting into your drawings or anything else. I'm just talk-

Thus, the uncontradicted expert testimony, provided by the only architects who testified, shows that it would not be possible to follow Exhibit D in constructing a store of the type required by the court's Order. Consequently, it would be impossible to perform the contract which the court's Order requires the builders to execute.*

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ing about Exhibit D, and what I'm saying is one problem you pointed out—as I understood your testimony you initially told me that Exhibit D could be applied at the third site?

A. Yes, if you want to adjust this outline specification, you want to say that I will eliminate the lower level?

Q. Yes.

A. Right, and take the building and not follow the outline specifications and change it, turn it 90 degrees—

Q. Yes.

A. continuing, —and not provide lower level entrances to this—

Q. Right.

A. Continuing —and adjust the parking and adjust the topography because Building C—

Q. Excuse me, the parking and topography are outside. That's not in these specifications?

A. No, but they relate to the building.

Q. I understand, but they are not in the specifications, just stay with them. If you did that, if you did the things you said, just eliminated the lower level entrance, swung the building 90 degrees around, you could use Exhibit D?

A. Yes.

Q. Thank you. Tr. 815-16, F. 1799-1800.

* It should be noted that the Order is a far cry from the relief which City Stores assured the court was feasible, namely, the "acceptance of the rental and terms of either" the Hecht or Woodward & Lothrop agreements which it represented to the court required "no further bargaining between" the parties. City Stores' Memorandum of January 14, 1966, p. 3, F. 437. Indeed, at the hearing on City Stores' Motion for a Preliminary Injunction, its Chairman of the Board testified as follows:

Q. Now, after having those leases reviewed, is Lansburgh's prepared to accept a lease identical to the Hecht lease and the Woodward & Lothrop lease except for change of name, you know, things like that?

A. (Nodding affirmatively.)

(footnote continued on next page)

The courts have uniformly denied specific performance of construction contracts as uncertain as that attached to the court's Order.

Specific performance of the agreement in *Besinger* v. *National Tea Company*, 75 Ill. App.2d 395, 221 N.E.2d 156, 157-58, (1966) was denied on the ground that the builder's obligations were uncertain. Plaintiff, the owner of vacant property, sought specific performance of a commitment by the National Tea Company to lease the property and build upon it a supermarket. The standards for design and construction in that agreement, which the court found too uncertain to permit specific performance, were as follows: (1) "a fully improved commercial building;" (2) "having a fully enclosed area of not less than ninety-three thousand (93,000) square feet;" (3) "suitable for use as a food supermarket or discount store;" (4) that is "of as good or better quality and workmanship as the commercial building recently constructed for and a portion of which is presently operated by lessee as a food supermarket in Rolling Meadows, Illinois," and (5) with "all outbuildings, service areas, driveways, and all other structures necessary and suitable for the conduct of Lessee's business." In upholding the lower court's denial of specific performance, the Supreme Court of Illinois said:

> • • • Obviously these are matters which must be settled before erection of the building is possible. Due to the absence of specifications and plans, the chancellor would be unable to order the construction of a particular building or determine that the resultant building constituted no greater benefit to the plaintiff than he had

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Q. At the third site?
A. Yes, we are.
Q. You would enter such a lease now?
A. Yes, sir, forthwith. PX-B, p. 80, F. 1296.

> bargained for and no greater burden on the defendant than it had assumed. Hence, the relief of specific performance was properly denied. (*Id.* at 158.)

The court found no solace in plaintiff's expressed willingness to approve *any* plans and specifications, "as long as they are for a building of the size and type specified in the lease." 221 N.E.2d at 158.

Specific performance was also denied in *Peoples Drug Stores* v. *Fenton Realty Corp.*, 191 Md. 489, 62 A.2d 273 (1948), decided by the Court of Appeals of Maryland, in which the court held that the standard provided in that contract—conformity to the most recent of plaintiff's chain stores—was too vague for the court to enforce.

Similarly, in *Beck* v. *Bernstein*, 198 Md. 244, 81 A.2d 608 (1951) the Maryland Court of Appeals held that where the cost of the building had been established but other specifications were not set forth, specific performance of an agreement to construct the building would be refused because "it is hard to conceive of a more indefinite description of a building . . . ." 81 A.2d at 610. See also *State of Washington* v. *Oregon-Washington R. & Nav. Co.*, 8 F.Supp. 98 (W.D. Wash. 1934); *Lester's Home Furnishers, Inc.* v. *Modern Furniture Co.*, 1 N.J. Super. 356, 61 A.2d 743 (1948).

The district court held, however, that no cases decided in this jurisdiction reflect a policy which would bar specific performance in this case on the ground that the terms of the contract are uncertain. We disagree. The rule in this jurisdiction is firm and unambiguous:

> A decree for specific performance will not be granted unless the evidence of the making of the contract is clear and convincing, and unless its terms, the consideration on which it is founded, and the time of its

> execution are clearly established. *Cleborne* v. *Totten*, 61 App. D.C. 69, 57 F.2d 435, 438 (1932).

This rule has been applied without exception, and neither this Court nor the district court has ever decided a reported case in which specific performance was granted of a construction contract as indefinite as the one attached to the court's Order.

In *Morris* v. *Ballard*, 56 App. D.C. 383, 16 F.2d 175 (1926), relied upon by the district court, the Court allowed specific performance of an option to purchase land on a specified date for a specified sum of money, the only uncertainty being the terms upon which the agreed purchase price was to be paid. However, when the optionee brought suit he tendered the full purchase price to the seller, thus clearly eliminating any possible dispute on the alleged uncertain clause in the option. The court recited the controlling rule, found in numerous cases, that "equity will not enforce specific performance of a contract, if any of its material terms has been left to be settled by future negotiation," and then noted that "the peculiar facts of this case differentiate it from such authorities." *Id.* at 176.

The other case from this jurisdiction upon which the court below relied was *Walsh* v. *Rundlette*, 9 D.C. 114 (1875). The Supreme Court of the District of Columbia decreed specific performance of an option to lease an already existing building (no construction was required), even though the option did not specify the covenants to be in the lease. The court said:

> We have seen that a specific performance, where there is an omission as to the covenants of an agreement for a lease, will be decreed with usual covenants, according to the nature of the lease, and such as are incident to it. 9 D.C. at 122.

In contrast, the terms that are missing in this contract—calling for construction of a large and unique store at a regional shopping center—are "substantial terms" on which negotiations must be held, as the district court itself found, and so can hardly be called the "usual covenants." *

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* Where specific performance has been ordered in this jurisdiction, as in *Morris* and *Walsh*, the courts were dealing with trivial problems of uncertainty. In *Gunton* v. *Carroll*, 101 U.S. 426 (1879), the remaining debt of a deceased debtor was to be reduced by the value of property which the debtor had agreed to convey, but had not conveyed, to the plaintiff creditor bank. The clause providing for determination of the price to be charged against the debt was not uncertain; the price was to be determined, under the agreement, by three arbitrators, one of whom debtor was to appoint, but never did before he died. The court ordered specific performance of the agreement because of unusual circumstances, despite a claim that the price term was uncertain. It held that in an ordinary case the agreement *would be too indefinite to be enforced*. However, since the value of the property was far less than the remaining debt, and since the rest of the debt would never be fully paid off, the property's price was "a mere form, immaterial to either party." *Id.* at 430. Of course, where the uncertainty is irrelevant, problems of unfairness, supervision and judicial overreaching do not arise. In *Bride* v. *Reeves*, 36 App. D.C. 476 (1911), the uncertainty resided in the failure to recite in a real estate contract the city in which specified lots were located. But the court found that this "latent ambiguity" could be removed by extrinsic evidence. In *Johnson* v. *Tribby*, 27 App. D.C. 281 (1906), uncertainty of the contract was not an issue. Finally, in *Worthington & Sons Management* v. *Levy*, 204 A.2d 334 (D.C. App. 1964), the court enforced specific performance of an option to renew a lease, where the uncertain term provided for "a rental to be agreed upon by both parties, such agreement to be based upon the prevailing fair rentals for similar property at that time." The court found this to be a "definite criterion" for establishing rental for a parking lot. In all other reported cases in this jurisdiction which defendant has been able to find in which the indefiniteness of the contract was an issue, specific performance was denied because the contract was unclear. *Crowell* v. *Gould*, 68 App. D.C. 297, 96 F.2d 569 (1938); *Hearst Radio, Inc.* v. *Good*, 67 App. D.C. 250, 91 F.2d 555 (1937); *Cleborne* v. *Totten*, 61 App. D.C. 69, 57 F.2d 435 (1932); *Evans* v. *Neumann*, 51 App. D.C. 300, 278 F. 1013 (1922); *Waters* v. *Ritchie*, 3 App. D.C. 379 (1894); *Repetti* v. *Maisak*, 6 Mackey 366, 17 D.C. 366 (1888). See *Melaro* v. *Mezzanotte*, 122 App. D.C. 244, 352 F.2d 720, 721 (1965).

No other District of Columbia case was cited by the district court as precedent for the Order it issued, and there can be no question but that the district court in ordering specific performance of an agreement to construct a unique, large and expensive department store building which has not yet been designed, where only approximate cost and intangibles of design conformity with other buildings are known, has taken steps unprecedented in the jurisprudence of this jurisdiction or of any jurisdiction in the United States.

An uncertain agreement requiring many interpretations of broad and ambiguous terms over a long period of time presents overwhelming problems of judicial supervision. The district court cited 22 cases for the proposition "which increasingly is being followed in this country, . . . that such contracts should be specifically enforced unless the difficulties of supervision outweigh the importance of specific performance to the plaintiff." (Op., ~~p. 19.~~ App C, p. 25, post)

The district court quoted brief language from the opinions in *Joy* v. *St. Louis*, 138 U.S. 1 (1891), and *Union Pacific Ry. Co.* v. *Chicago, R.I. & P. R. Co.*, 163 U.S. 564 (1896), but did not discuss the facts and holdings of these two cases. In both cases, the court enforced contracts under which one railroad had agreed to let another use its uniquely located railroad tracks; in both cases the court relied on a supervening public interest in enforcement of that obligation. In *Joy*, the choice was between specific enforcement or desecration of a large public park in St. Louis. The court said:

> Here is a great public park, one of the lungs of an important city, which, in order to maintain its usefulness as a park, must be as free as possible from being serrated by railroads; and yet the interests of the public demand that it shall be crossed by a railroad. But

> the evil consequences of such crossing are to be reduced to a minimum by having a single right of way, and a single set of tracks, to be used by all the railroads which desire to cross the park. These two antagonisms must be reconciled, and that can be done only by the interposition of a court of equity, which thus will be exercising one of the most beneficent functions. 138 U.S. at 50.

Similarly, in *Union Pacific* the court recognized that cases involving railroad rights-of-way are exceptional. The court said:

> • • • Considerations of the interests of the public must be given due weight by a court of equity, when a public means of transportation, such as a railroad, comes under its jurisdiction. . . .
>
> Clearly, the public interests involved in the contracts before us demand that they should be upheld and enforced. 163 U.S. at 603.

The court said that "it is impossible for us to ignore the great public policy in favor of continuous lines thus declared by Congress."

Furthermore, the court found that neither case presented problems of indefiniteness or supervision. In *Joy*, the court was careful to note that the practical difficulties of carrying out the order clearly amounted "to very little, if anything."

In *Union Pacific*, the contract explicitly referred all disputes to referees, thus leaving the court with no burden of supervision.

The district court also quoted briefly from *Jones* v. *Parker*, 163 Mass. 564, 40 N.E. 1044 (1895). In that case, however, the court enforced a lease which required defendant "reasonably to heat and light the demised premises," part of a basement in a building. Performance of such a

trivial task, which can refer to common everyday standards and practices, hardly compares with the mass of complex, unique and unclear tasks involved in the design and construction of a large department store building.

Cases in which performance of limited tasks were required, such as the completion of buildings, the paving of roads or other routine chores, form no precedent for the extraordinary Order the district court entered.*

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* Each of the 22 cases relied upon by the district court involved a clear standard of performance, with the exception of one, in which the court *refused* specific enforcement of a construction contract: *Rector of St. David's* v. *Wood*, 24 Or. 396, 34 P. 18 (1893). In nine cases specific performance presented no problem at all because clear and precise standards existed to guide the work ordered to be done: *Wheeling Traction Co.* v. *Board of Com'rs of Belmont County, Ohio*, 248 F. 205 (6th Cir. 1918) (pave road between tracks with the same material as rest of road, a standard found "defined" and "clear" by the court); *Board of Comm. of Mattamuskeet Drainage Dist.* v. *A. V. Wills & Sons*, 236 F. 362 (E.D.N.C. 1916) (complete second half of drainage system according to "defined and certain" plans and specifications); *Laurel Realty Co.* v. *Himelfarb*, 191 Md. 462, 62 A.2d 263 (1948) (complete unfinished house according to "clearly defined" plans and specifications); *Brummel* v. *Clifton Realty Co.*, 146 Md. 56, 125 A. 904 (1924) (complete unfinished house according to "clearly defined" specific list of things left to be done); *McDonough* v. *Southern Oregon Mining Co.*, 177 Or. 136, 159 P.2d 829, 161 P.2d 786, 164 A.L.R. 788 (1945) ("level, restore and repair" mined land); *Chesapeake & Ohio R. Co.* v. *William Slate Co.*, 143 Va. 722, 129 S.E. 499 (1925) (relocate tracks according to description written by skilled engineer referring to peculiar local physical conditions); *Edison Realty Co.* v. *Bauerschub*, 191 Md. 451, 62 A.2d 354 (1948) (complete house to provide all features of existing sample house); *Gas Securities Co.* v. *Antero & Lost Park Reservoir Co.*, 259 F. 423 (8th Cir.), *cert. denied*, 250 U.S. 667 (1919) (completion of the final 10% of an irrigation system). Similarly, *Grayson-Robinson Store* v. *Iris Construction Corp.*, 8 N.Y.2d 133, 202 N.Y.S.2d 303, 168 N.E.2d 377 (1960), is not only distinguishable as a case involving enforcement of an arbitration award, but also because the plans and specifications of the building were practically complete. In five other cases, the problem before the courts was that the obligations extended over a long period of time; the standard of performance was clear in each case: *Great Lakes & St. Lawrence Transportation Co.* v. *Scranton*

To require the builders to build at their own expense a building to be specified by Lansburgh's in the future is to do violence to the most cherished and fundamental principles of contract law. The builders never agreed to construct at their own expense a building for the Hecht Company, Woodward & Lothrop, or Lansburgh's without first knowing precisely what they were to build.

Coal Co., 239 F. 603 (7th Cir. 1917) (carry coal at specified price); *Texas Co.* v. *Central Fuel Oil Co.*, 194 F. 1 (8th Cir. 1912) (deliver product of oil well into purchaser's pipe line, an "easily ascertainable" task); *Kearns-Gorsuch Bottle Co.* v. *Hartford-Fairmont Co.*, 1 F.2d 318 (S.D.N.Y. 1921) (perform under standard printed lease and license where defendant made no claim that it could not easily perform); *Prospect Park & C.I.R. Co.* v. *Coney Island & B.R. Co.*, 144 N.Y. 152, 39 N.E. 17 (1894) (run specified trains on specified tracks, where the "provisions of this contract are neither complicated nor difficult"); *Municipal Gas Co.* v. *Lone Star Gas Co.*, (Tex. Civ. App.) 259 S.W. 684 (1924), *aff'd* 117 Tex. 331, 3 S.W.2d 750 (1928) (provide specified amount of gas at specified price). Four more of the district court's 22 cases involved common, non-complex tasks to be performed in accordance with well-established and easily ascertained standards: *Zygmunt* v. *Avenue Realty Co.*, 108 N.J.E. 462, 155 A. 544 (1931) ("cut through a street" which did not violate the firm rule that "no contract is specifically enforced unless it be certain in all points"); *Grubb* v. *Starkey*, 90 Va. 831, 20 S.E. 784 (1894) ("build a pipeline from a stream to a field which "could be readily performed by almost any ordinary workman,"); *Strauss* v. *Estates of Long Beach*, 187 App. Div. 876, 176 N.Y.S. 447 (1919) ("install ordinary residential sewer"); *Jones* v. *Parker*, discussed in text, *supra*. In the remaining cases cited by the district court, the enforced performance was guided by clear standards, and, in addition, the courts relied on the strong public interest at stake: *Union Pacific Ry.* and *Joy*, discussed in text, *supra*; *Edison Illuminating Co.* v. *Eastern Pa. Power Co.*, 253 Pa. 457, 98 A. 652 (1916) (replace, restore and maintain a public utility's power plant equipment). This well-established public interest exception to the usual rules governing specific performance was recognized as well in *Wheeling Traction Co., supra*; *Prospect Park & C.I.R. Co., supra*.

Thus the district court's 22 cases display a striking consistency in their explicit recognition that specific performance is the exception, rather than the rule, and that it is available only in those few cases in which the work to be done is clearly defined.

VI. THE RIGHT OF THE HECHT COMPANY AND WOODWARD AND LOTHROP TO APPROVE BOTH THE PRELIMINARY PLANS FOR THE THIRD DEPARTMENT STORE AND THE FINAL PLANS PRECLUDE SPECIFIC PERFORMANCE.

Even if plans were in existence for the proposed Lansburgh's store, and the parties had agreed to those drawings, and the builders were willing to obligate themselves to construct at their expense a building designed in accordance with such drawings, that would not end the matter, since both Hecht's and Woodward & Lothrop have the right under their contracts to approve all of the design, engineering and construction elements of both the preliminary plans and the working plans of the third department store.[150] In the event the Hecht Company or Woodward & Lothrop were to withhold approval of either the preliminary or the working plans, the only sanction permitted by their contracts is resort to arbitration and an annulment of the action withholding approval.[151] There is no time limit fixed for the Hecht and Woodward & Lothrop approvals of working plans for the third store.[152]

Where performance of a contract is in part or in whole conditioned upon the approval or other action by third parties not before the court, the courts have refused to order specific performance. *Fiedler, Inc.* v. *Coast Finance Co.*, 129 N.J.E. 161, 18 A.2d 268 (1941); *Wichita Water Co.* v. *City of Wichita*, 280 F. 770 (8th Cir. 1922); *Waters* v. *Ritchie*, 3 App. D.C. 379 (1894). The district court's opinion is silent upon this overriding problem.

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[150] PX-F, § 10.2(A), (C), pp. 46, 47, 49.

[151] PX-F, § 40.4, pp. 132, 133; § 10.2(D), p. 49.

[152] PX-F, § 10.2(c).

CONCLUSION

Applying established legal principles to the record facts, it is clear that there was no "clear and convincing proof" that the businessmen involved in this case orally entered into the implausible contract alleged in the Complaint. Furthermore, that alleged contract is one which should not be and cannot be enforced by a court exercising equitable powers.

Judgment below should be reversed with directions to dismiss the Complaint.

Respectfully submitted.

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DATE: August 7, 1967

Certificate of Service

I, Melvin Spaeth, a member of the bar of this court, hereby certify that a typewritten copy of the foregoing Brief for Appellants was served upon counsel for Appellee this 7th day of August, 1967, by delivering a copy thereof to Robert Martin, Esq., in care of Leva, Hawes, Symington, Martin & Oppenheimer, 815 Connecticut Avenue, N. W., Washington, D. C. 20006, and that a typewritten copy of the Brief for Appellants has been placed in the hands of Record Press, 95 Morton Street, New York, New York, for reproduction as the printed brief. No changes in the brief to be filed in printed form will be made, except for minor changes or corrections.

MELVIN SPAETH

APPENDICES

APPENDIX A

Docket Entries

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

DATE	PROCEEDINGS
1966	
Jan. 14	Complaint, appearance, Exhibits A thru Q filed
Jan. 14	Summons, copies (8) and copies (8) of Complaint issued #8, 1 & 4 ser. 1/14/66; #7, 3 & 6 ser. 1/20/66; #2 & 5 N.F. 1/19/66
Jan. 14	Motion of Pltf. for Temporary Restraining Order. #8, 1 & 4 ser. 1/14/66; #7, 3 & 6 ser. 1/20/66; #2 & 5 N.F. 1/19/66 filed
Jan. 14	Motion of Pltf. for Preliminary Injunction; Affidavit, Ex. A thru G; Affidavit, Ex. (1) thru (6); Affidavit, Ex. A thru D; Affidavit, Ex. A thru G; Affidavit, Ex. A thru H; Affidavit, Ex. A thru C; Affidavit, Ex. A; P & A
Jan. 14	Stipulation continuing hearing on motion for temporary restraining order to January 21, 1966. filed
Jan. 21	John J. Ghingher, Jr. of the Maryland Bar is admitted for defendants pro hac vice, nunc pro tunc to January 14, 1966; stipulation continuing hearing on temporary restraining order to February 1, 1966 at 1:45 P.M. approved (fiat) Gasch, J.

DATE	PROCEEDINGS
1966	
Feb. 2	Stipulation extending time for defendants to answer complaint until February 15, 1966. approved (fiat) Gasch, J.
Feb. 2	Stipulation that defendants will not perform certain acts (See Stipulation for details) pending further Order of Court and setting hearing on motion for preliminary injunction for March 2, 1966 at 9:30 A.M., approved (fiat) Gasch, J.
Feb. 18	Answer of defendants to complaint; c/m 2 16 66; appearance of H. Max Ammerman
Feb. 18	Calendared (N) (AC/N)
Feb. 18	Motion of defendants to dismiss; points and authorities; c m 2/16/66 M.C. 2/18/66. filed
Feb. 18	Stipulation continuing hearing on motion for preliminary injunction to March 23, 1966 and continuing temporary restraining order in effect until further order upon completion of said hearing, approved. (FIAT) (N) Gasch, J.
Feb. 28	Motion of defendants for production of documents under Rule 34; affidavit; points and authorities; P/S 2/26/66; M.C. 2/28/66. filed
Feb. 28	Appearance of Edgar H. Brenner for defendants. (AC/N) filed
March 3	Appearance of Melvin Spaeth for defendants. (AC/N) filed

DATE	PROCEEDINGS
1966	
March 4	Amended complaint; c/m 3/4/66; consents of defendants (2). filed
March 7	Notice by defendants to take deposition of Robert Martin; c/m 3/7/66. filed
March 18	Answer of defendants 2 thru 8 to amended complaint; counterclaim vs. plaintiff; jury demand; c/ser. 3/18/66. filed
March 18	Memorandum of defendants 2 thru 8 in opposition to plaintiff's motion for preliminary injunction; affidavit; exhibit I; c/ser. 3/18/66. filed
March 22	Memorandum of plaintiff in reply to defendants' memorandum in opposition to motion for preliminary injunction; c/m 3/22/66. filed
March 22	Memorandum of plaintiff in opposition to defendants' motion to dismiss motions for temporary restraining order and preliminary injunction and to dismiss complaint; P.S. 3/22/66; affidavits (2); Exhibits. filed
March 22	Supplementary affidavit of Theodore N. Lerner; exhibits A, B and C; c/m 3/22/66. filed
March 23	Affidavit of Ora T. McKnight; Exhibits A and 5. filed
April 6	Answer of plaintiff to counterclaim; c/m 4/6/66. filed
April 19	Findings of fact and conclusions of law. (Order to be presented) (N) Gasch, J.

DATE	PROCEEDINGS
1966	
April 20	Reply memorandum by defendants to opposition of plaintiffs to defendants motions; c/m 4/66. filed
April 20	Transcript of proceedings, Jan. 14, 1966, pages 1 to 50, inclusive. (Court's copy) (Rep. Edna B. Romig) filed
April 20	Transcript of proceedings, March 23, 1966, pages 1 to 116, 116-A, B, 117 to 158, 158-A. (Court's copy) (Rep. George G. Davis, Jr.) filed
April 21	Exhibits #1, 2, 3, 4, 5, 6, 7, 8 and 9 by defendants. filed
April 21	Exhibit #10 of defendants (Deposition of Theodore N. Lerner, March 8, 1966) filed
April 21	Deposition of Theodore N. Lerner, March 8, 1966, morning. filed
April 21	Deposition of Theodore N. Lerner, March 8, 1966, afternoon. filed
April 21	Deposition of Louis Max Frankel, March 8, 1966. filed
April 21	Deposition of Herman Leo Neugass, March 9, 1966. filed
April 21	Deposition of Sidney H. Cass, March 10, 1966. filed
April 21	Deposition of Irving J. Zipin, March 10, 1966. filed
April 21	Deposition of Gustave G. Amsterdam, March 10, 1966. filed

DATE	PROCEEDINGS
1966	
April 21	Deposition of Louis G. Melchior, March 11, 1966. filed
April 21	Deposition of Charles H. Jagels, March 14, 1966. filed
April 21	Deposition exhibits of defendants. filed
May 2	Stipulation of counsel extending time for plaintiff to respond to motion to produce to May 16, 1966. filed
May 9	Motion to dismiss further argued and denied. (Order to be presented) (Rep. Edna Romig) Gasch, J.
May 9	Oral motion re: form of order and for bond argued and taken under advisement. (Rep. E. Romig) Gasch, J.
May 18	Transcript of proceedings, pages 1-83, May 9, 1966. (Rep. Edna B. Romig) (Court's copy) filed
May 18	Order denying motion of defendants to dismiss motion of plaintiff for preliminary injunction and counts 1, 2 and 3 of complaint. (Signed 5/17/66) (N) Gasch, J.
May 24	Motion of plaintiff to strike defendants' demand for jury trial or for a separate trial; points and authorities; c/ser. 5/24/66; M.C. 5/24/66. filed
May 31	Motion of defendants for production of documents; P&A, affidavit c/m 5/31/66; M.C. 5/31/66. filed

DATE	PROCEEDINGS
1966	
May 31	Memorandum of points and authorities of defendants in opposition to motion of plaintiff to strike jury demand; c/m 5/31/66. filed
May 31	Withdrawal without prejudice of motion of defendants on 2/26/66 for production of documents; c/m 5 31/66, per attorney for defendants. filed
May 31	Interrogatories of defendants to plaintiff; c/m 5/31 66. filed
May 31	Notice of defendants to take deposition of plaintiff; c/m 5/31/66. filed
May 31	Notice of defendants to take deposition of Real Estate Research Corp. and Community Research & Development, Inc.; c/m 5/31/66. filed
June 1	Interrogatories of defendants to plaintiff. (unsigned) unfiled
June 3	Reply of plaintiff to defendants' points and authorities in opposition to motion to strike jury demand. filed
June 8	Order for preliminary injunction; $10,000. Cash or undertaking #2 ser. 6/16/66 Gasch, J. (N)
June 9	Injunction undertaking of plaintiff in amount of $10,000.00 (cash); deposit $10,000.00 by plaintiff, Corp. Secy. Dunn. filed
June 14	Stipulation of counsel for voluntary dismissal of counts three and four of complaint. filed

DATE	PROCEEDINGS
1966	
Aug. 15	Order placing case on Ready Calendar and directing that case be set for trial in October before Judge Gasch. (N) (AC/N) Gasch, J.
Sept. 28	Exhibits of defendant #1 thru 10 returned to defendant's attorney.
Oct. 5	Pre-trial hearing held. (Rep. E. Romig) Gasch, J.
Oct. 14	Motion of defendant to dismiss; points and authorities; p/s 10/14/66; M.C. 10/14/66. (Fiat) Gasch. J.
Oct. 19	Transcript of proceedings, 10/5/66, pages 1-30. (Edna B. Romig—Reporter) (Clerk's copy) filed
Oct. 19	Hearing begun: continued to 10/20/66. (Reps. S. Hatch, E. Kaufman, J. Blair, E. Romig) Gasch, J.
Oct. 20	Stipulation for voluntary dismissal of counts three and four of plaintiff's complaint. filed
Oct. 20	Hearing resumed; continued to 10/21/66. (Reps. S. Hatch, R. Henderson, E. Kaufman) Gasch, J.
Oct. 21	Hearing resumed; continued to 10/24/66. (Rep.—S. Hatch) Gasch, J.
Oct. 24	Hearing resumed; continued to 10/25/66. (Reps. S. Hatch, E. Romig, E. Kaufman) Gasch, J.

DATE	PROCEEDINGS
1966	
Oct. 25	Hearing resumed and concluded; taken under advisement: plaintiff allowed ten days to file findings of fact and conclusions of law and the defendants allowed ten days to reply. (Reps. S. Hatch, R. Henderson, E. Kaufman) Gasch, J.
Oct. 25	Order denying motion of defendants to dismiss. (N) Gasch, J.
Oct. 31	Transcript of proceedings, Oct. 19, 1966, pages 1-161. (Reporter Shirley J. Hatch) (Clerk's copy) filed
Oct. 31	Transcript of proceedings, Oct. 20, 1966, pages 162-371. (Reporter Shirley J. Hatch) (Clerk's copy) filed
Oct. 31	Transcript of proceedings, Oct. 21, 1966, pages 372-437. (Reporter Shirley J. Hatch) (Clerk's copy) filed
Oct. 31	Transcript of proceedings, Oct. 24, 1966, pages 438-669. (Reporter Shirley J. Hatch) (Clerk's copy) filed
Oct. 31	Transcript of proceedings, Oct. 25, 1966, pages 669-853. (Reporter Shirley J. Hatch) (Clerk's copy) filed
Nov. 22	Comments of defts on proposed findings of pltf; P&A; c/s 11/21/66. filed
Nov. 22	Comments of defts on sealed exhibit of pltf; c/s 11/21/66. filed
Dec. 16	Post trial reply memo by deft; c/m 12/16/66. filed

DATE	PROCEEDINGS
1967	
Jan. 30	Deposition of Herman Leo Neugass 9/29/66. (cost $21.60) filed
Apr. 5	Opinion granting specific performance. (N) Gasch, J.
May 9	Objections of defts to form of order for specific performance and permanent injunction; exhibit A & B; c/m 5/9/67; M.C. filed
June 5	Transcript of proceedings; pp 1-52; June 2, 1967; (Rep: Elaine O. Wells) Clerk's Copy. filed
June 13	Letter dated 6/13/67 from Robert Martin to Judge Gasch regarding stipulation, lease and amendments. filed
June 13	Stipulation of all counsel approved. Gasch, J.
June 13	Supplemental memorandum. Gasch, J.
June 13	Order for specific performance and a permanent injunction: lease between City Stores Co., and Tyson's Corner Regional Shopping Center; first amendment of and supplement to lease; supplemental lease Agreement: exhibits B, F, J and J-1. (N) Micro 6/14/67 Gasch, J.

APPENDIX B

District of Columbia Statute of Frauds

12 D. C. Code § 302 (1961 ed.)

> "No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, which need not state the consideration, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized. (Mar. 3, 1901, 31 Stat. 1367, ch. 854, § 1117.)"

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 98-66

CITY STORES COMPANY,

Plaintiff.

v.

H. MAX AMMERMAN, et al.,

Defendants.

Opinion

Robert Martin, Alexander B. Hawes, and Richard Shlakman, of Fowler, Leva, Hawes & Symington; and Richard K. Lyon, all of Washington, D. C., for Plaintiff.

H. Max Ammerman; and Edgar H. Brenner and Melvin Spaeth of Arnold & Porter, all of Washington, D. C., for Defendants.

The plaintiff, City Stores Company, seeks specific performance of a contract wherein defendants allegedly promised to offer plaintiff a lease as a major tenant in defendants' shopping center in Tyson's Corner, Fairfax County, Virginia. By the terms of the contract, the defendants were to give plaintiff an opportunity to accept a lease on terms at least equal to those offered to other major department stores in the center. The court granted a preliminary injunction to prevent the defendants from

leasing the last available department store site to another department store. Now the court is called upon to decide whether there is a valid contract and, if so, whether it is sufficiently definite so that specific performance of it should be decreed.

Defendants desired to construct a large shopping center on a tract of land near Tyson's Corner, in Fairfax County, Virginia. In order to build the center, they had to persuade the Board of County Supervisors of Fairfax County to rezone the property for that use. By the time plaintiff came into the picture, defendants' prospects for securing the necessary zoning were not good: the Fairfax County Planning Commission and the Planning Commission Staff had voted against defendants' requested zoning. Defendants had to persuade the Board that these advisory groups were wrong in their recommendations. Moreover, defendants had an extremely strong competitor, the Rouse-Reynolds group, for another shopping center in the same general area. There was a zoning application for the Rouse-Reynolds center pending before the Board of Supervisors at the same time. Hearing on defendants' application was set for May 31, 1962.

During a period of time prior to May 31, Lansburgh's Department Store, which is owned by City Stores Company, the plaintiff herein, had been negotiating the terms of a lease of a store site in the Wheaton Plaza shopping center with defendants Lerner and Gudelsky. In the course of meetings with Mr. Lerner, or Messrs. Lerner and Gudelsky together, Lansburgh's president, Mr. Jagels, learned of the Tyson's Corner proposal. Mr. Lerner asked for a letter from Lansburgh's expressing a desire to participate in defendants' Tyson's Corner project, which could be used in the hearing before the Fairfax County Board of County Supervisors. Mr. Lerner had sought similar letters

from other department stores in Washington, but found them unwilling to express a preference for defendants' Tyson's Corner site over the nearby proposed site of the Rouse-Reynolds group. Under normal circumstances, Lansburgh's also would have been unwilling to express a preference for one site over the other. It was eager to obtain suburban department store sites for expansion purposes. But, for a reason which is a matter of dispute between plaintiff and defendants, Mr. Jagels wrote a letter to Mr. Lerner and Mr. Gudelsky (Plaintiff's Exhibit E) in which he stated that it was Lansburgh's conclusion that the Tyson's Corner site was preferable to any other in the area and expressing Lansburgh's great interest in becoming a major tenant at a Lerner-Gudelsky shopping center if they were successful in their zoning application.

Defendants contend that plaintiff wrote this letter in order to secure defendants' help in obtaining necessary permission from other department store tenants in the Wheaton Plaza shopping center for plaintiff to become another major tenant there. However, I find that this contention is not supported by the evidence. The evidence shows that during the period in question, plaintiff and Lerner-Gudelsky had not themselves reached agreement on rental and other terms for plaintiff to become a tenant in the Wheaton Plaza center, and that they were engaged in negotiations. It was not until November of 1962, by defendant Lerner's own correspondence records, which are part of the evidence herein, that either plaintiff or defendants became aware that there would be an objection raised to plaintiff's tenancy by Montgomery Ward, one of the major tenants at Wheaton Plaza with right of approval of other lessees.

Plaintiff contends, on the other hand, that the Jagels letter to Lerner and Gudelsky was written at Lerner's

request in exchange for a promise that plaintiff would be given an opportunity to become a major tenant at Tyson's Corner on terms at least equal to those of other major tenants at the center.

I find that on or about May 29, 1962, the Lerner-Gudelsky interests promised to give Lansburgh's an opportunity to become a major tenant at the Tyson's Corner center on terms at least equal to those granted other major department store tenants in exchange for assistance from Lansburgh's in securing the necessary zoning for the tract. I further find that on or about May 29, 1962, the defendants Lerner and Gudelsky signed and gave to Lansburgh's president Jagels the following letter concerning the defendants' promise, and that this letter, together with plaintiff's full performance of the requested services, is a sufficient writing to satisfy the Statute of Frauds, § 12-302 D. C. Code. The letter is Plaintiff's Exhibit B, and states:

> Dear Mr. Jagels:
>
> We very much appreciate the efforts which you have expended in endeavoring to assist Mr. Gudelsky and me in our application for zoning at Tyson's Corner for a Regional Shopping Center.
>
> You have our assurance that in the event we are successful with our application, that we will give you the opportunity to become one of our contemplated center's major tenants with rental and terms at least equal to that of any other major department store in the center.
>
> Sincerely yours,
>
> /s/ Isadore M. Gudelsky
> /s/ Theodore N. Lerner

I also find that the services plaintiff performed for defendants, particularly the letter from Mr. Jagels which defendants used to support their case in the zoning hearing on May 31, constituted adequate consideration for a valid unilateral contract which was binding on defendants thereafter.

I

The plaintiff contends that this unilateral contract is an option for an opportunity to accept or reject a lease for a store at Tyson's Corner on terms at least equal to those granted to other major tenants. Defendants deny that the agreement is an option contract and contend that, even if it were, it would not be sufficiently definite to be specifically enforced by this court.

In determining the nature and consequences of this contract, it should be observed first that a typical option contract is a continuing offer for a fixed period of time (or a reasonable time if no time is specified) which is binding on the offeror because given for a valuable consideration.[1] As noted by Williston, the word "option" is a business and not a strictly legal term. 5 Williston on Contracts § 1441 (Rev. Ed. 1937). An option contract is a unilateral contract as is the contract at issue. Generally, however, an option contract describes specifically the subject offered and all its material terms. The offeree knows at the time he receives the option exactly what has been offered and what he may accept or reject. It is obvious that the contract between Lerner-Gudelsky and Lansburgh's is not of this description, and further analysis is needed to decide whether or not it may be classified as an option, despite its superficial dissimilarity to the usual form.

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[1] *Willard* v. *Taylor*, 75 U.S. 557 (1869).

In this case, it is clear that an option in typical form could not have been offered by Lerner-Gudelsky, because they had nothing but a contingency to offer at the time the contract was made. Any specific terms they might have included in their letter to Jagels would have been meaningless in view of the fact that they had neither received the necessary permission to construct their center, nor had they entered into leases with other major tenants which were to be the measure of the lease offered to Lansburgh's. Yet it does not follow from this that what they did promise to offer Lansburgh's was without substance. What we have here is a contract with certain conditions precedent to its operation.

The first condition precedent to the Lerner-Gudelsky obligation to Lansburgh's was the securing of necessary zoning for its Tyson's Corner tract, without which it could not construct a shopping center at all. The second condition precedent was its entering into leases with other major tenants for stores in the center, so the terms of those leases could provide the essential terms of a lease to be offered to plaintiff. Defendants did secure the zoning, and they did, in the latter half of 1965, enter into leases with Woodward & Lothrop and Hecht department stores. At the time it secured those leases, defendants were under an immediate contractual obligation to tender plaintiff a lease which in all its material terms would be at least as favorable to plaintiff as the two other leases were to their respective stores. That this would have been possible is entirely clear from the record: both the Hecht and Woodward & Lothrop leases, Plaintiff's Exhibit F, contain clauses to the effect that their terms will be at least equal to those offered to other lessees in the center. Thus, even though none of the stores in the center will be identical in design, it is apparent from defendants' own leases that complete equality

of material terms governing occupancy, including amount of space and cost per square foot, and substantially equal terms on less material aspects of the lease, is within the customary contemplation of parties entering into shopping center agreements of the type at issue in this case. When it is recognized that a lessor's success in a shopping center is directly tied to the success of all of his lessees, it must be conceded that as a practical business matter it is to the lessor's advantage that one tenant be given no distinct competitive advantage over another traceable to the terms of the leases entered into.

I therefore hold as a matter of law that the Lerner-Gudelsky letter was a binding unilateral contract, which gave plaintiff an option to accept a lease at Tyson's Corner, and that the existence of express and implied conditions precedent did not render it invalid or too indefinite to be a contract.

Defendants argue, in their Post-Trial Reply Memorandum, that the Lerner-Gudelsky letter to Lansburgh's is not a good contract because it is supported only by "past consideration." They rely on the case of *Murray* v. *Lichtman*.[2]

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[2] 119 U.S.App.D.C. 250, 339 F.2d 749 (1964). In *Murray* v. *Lichtman* there was evidence to show that defendant promised to indemnify plaintiff for any liabilities he incurred in exchange for plaintiff's help in arranging the sale of a building. Plaintiff performed as requested and, after he had completed his performance, defendant sent him a letter promising to indemnify him, but attaching a substantial condition to that promise. The plaintiff signified his approval of this letter by signing it at the bottom. Plaintiff later was forced to seek indemnification from defendant and defendant refused it on the ground that the need for it was contrary to the condition stated in defendant's letter. Plaintiff brought suit, and argued that the defendant should be held to his promise as stated orally prior to the writing of the letter. The trial court accepted defendant's argument that even if there had been a prior oral agreement, the writing constituted a written integration of that agreement and that the writing must control with respect to any inconsistencies because of the parol evidence rule. The trial

But the decision in *Murray* v. *Lichtman* does not help defendants in this case: on the contrary, it adds emphasis to the distinction—which defendants have failed to make—between the origin and nature of unilateral and bilateral contracts. A unilateral contract is created when the service requested by the offeror is performed by the actor. Upon completion of that performance, the offer becomes a *promise* contractually binding on the offeror-promisor. A unilateral contract has only one promisor, not two. Any attempt on the part of that promisor to later modify his obligation must be supported by new consideration.

The Lerner-Gudelsky letter in the present case is an option, a unilateral contract. Defendants became bound to deliver it to plaintiff the moment plaintiff performed the requested services. There is no contention here that the letter represents an integration of a prior oral bilateral agreement or that it is intended to represent a written bilateral contract. Plaintiff consistently has viewed the letter as an option, and that is what the Court, on the evidence, finds it to be.

Defendants also contend that this contract should be governed by the rule that where material terms remain to be decided by the parties, there is no contract at all, let alone one that can be specifically enforced. However, as the authorities cited by the defendants clearly reveal, that rule applies only where the parties fail to reach an enforceable

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court therefore granted defendant's motion for summary judgment. The Court of Appeals reversed and remanded because of the genuine issue of fact as to the existence of a prior contract. It rejected defendant's argument that the letter was a written integration of a prior contract, and pointed out that, assuming the prior contract, defendant's obligations under it had been fixed at the moment plaintiff performed the services requested. The contract could not be modified later by a writing which was unsupported by new consideration, in view of plaintiff's full performance.

agreement, that is, an agreement for a valuable consideration which is binding on both parties. 1 Williston on Contracts § 103 (Jaeger 3d Ed. 1957). It would be grave error to apply this rule to a binding option contract or to any contract where the promised performance (the consideration) has been completed by one of the parties. It is especially important in the context of this case to note that the rule has no applicability to options. An option is a true contract although in the form of an offer. Its form doesn't make it any less a contract, binding on the offeror and subject to the offeree's acceptance or rejection. For purposes of determining its definiteness and validity, an option must not be confused with the future bilateral contract it may give rise to, if the offeree decides to exercise it. An option granted for a valuable consideration, to enter into a bilateral contract later if the optionee chooses, fixes the optionee's rights. The offeror may not then revoke his offer (the option) because the optionee has given consideration for it.

This is to be contrasted with the situation where the parties merely discuss entering into a bilateral contract and perhaps go so far as to exchange suggested wording of such a contract, but where the negotiations fall short of actually becoming a binding contract. There is no exchange of consideration, either in the form of performance or of enforceable mutual promises in that type of case. And it is to such cases that the rule suggested by the defendants applies, not to the case at bar.

Although the defendants cited no cases from this jurisdiction, it is worth examining some of those they did cite to illustrate the distinction. In *Peoples Drug Stores* v. *Fenton Realty Corporation*, 62 A.2d 273 (Md. 1948), no option was involved at all. The parties had been nego-

tiating a contract, also for a store in a shopping center, and had corresponded concerning the terms of a proposed lease, which was to be drawn up by the plaintiff. *But the letter stated that the lease was to be subject to the defendant's approval.* Thus, if the defendant chose not to approve the lease, there was no contract at all, because a bilateral contract was contemplated, and if one of the parties was not bound, neither would be bound. As the Maryland court remarked:

> "The question whether the parties negotiating a contract intended to be bound by their oral agreement but contemplated a written instrument merely as evidence of their agreement, or whether they did not intend to bind themselves until a contract was prepared and signed by them, must be decided from the facts and circumstances in each particular case." 62 A.2d 273, 275.

After reviewing all the facts in that case, the Maryland court decided that no contract had been intended by the parties until the lease was actually signed. It is noted that even had the parties reached a binding oral agreement in this case, the contract thus formed would have been bilateral and not a unilateral option contract.

In *Store Properties, Inc.* v. *Neal*, 164 P.2d 38 (Cal. App. 1945), plaintiff and defendant both had signed a letter purporting to describe the material terms of a lease assented to by both parties. However, paragraph (9) of this letter contained the following language:

> "If a lease upon the above terms and conditions has not been executed within thirty (30) days from the date hereof, both parties reserve the right at any time thereafter, but prior to the execution of such a lease,

> to terminate this offer and the above sum of $5,000.00 shall thereupon be returned to the lessee upon demand." 164 P.2d 38, 39.

As the California District Court of Appeal observed, this clause, taken together with other language in the letter, indicated that neither party was bound by the letter, but that both parties contemplated being bound only upon the execution of a formal lease, if one should be executed. Again, this case did not involve an option agreement.

Elkhorn-Hazard Coal Co. v. *Kentucky River Coal Corp.*, 20 F.2d 67 (6th Cir. 1927), also relied upon by defendants, involved a letter from defendant to plaintiff which the court found was not intended to be an offer subject to contractual acceptance by plaintiff because the defendant clearly stated that if the suggested terms were approved by the plaintiff, the defendant would cause its general counsel to draw up a lease for the signature of the parties. As the court said, "It was clearly not intended to create contractual relations merely by mailing an acceptance." Again, it is important to note that plaintiff in this case gave the defendant no consideration for the letter to create an option contract; only a bilateral contract was contemplated on terms yet to be agreed upon by the parties.

It is true that the court in *Horvath* v. *McCord Radiator & Mfg. Co.*, 35 F.2d 640 (6th Cir. 1929), discussed the element of uncertainty in an option contract as a possible bar to a decree of specific performance prior to its disposition of the case on the grounds that no contract existed. (I will discuss the problem of indefiniteness of terms with respect to specific performance later in this opinion.) However, the discussion was not necessary to the court's decision, as it pointed out in these words:

"These difficulties, more or less insuperable, in enforcing specific performance, we have pointed out; but we do not rest our conclusion upon their existence. To us they are persuasive—if there were otherwise doubt—that the parties did not suppose they had arrived upon any final contract on this subject-matter. They were expressing what is commonly called an agreement in principle, fully recognizing that there must be further agreement upon details before there was a complete legal obligation. * * *" 35 F.2d 640, 642.

Once again, the facts of the case indicate that on the disputed subject matter the parties expressly contemplated entering into a bilateral contract at a future time.

The cases cited by defendants should be contrasted with the early case of *Walsh* v. *Rundlette*, 9 D.C. 114 (2 MacArthur 114) (Sup. Ct. D.C. 1875), where the Court granted specific performance of an oral bilateral contract to enter into a lease. The defendant in that case argued that specific performance should not be granted because the contract was oral and because its terms were indefinite. However, the Court found, on disputed facts, that an oral contract had been entered into. Once it found a contract on the facts, it concluded that the absence of specific terms from the oral agreement would not bar specific performance, which could be decreed "with such covenants as are usual and incident to leases of the same kind, and such as flew from the contract and are necessary to give it effect." 9 D.C. 114, 119.

A helpful discussion of the distinction between options and bilateral contracts is contained in 1 Williston §§ 61A-61D, (Jaeger 3d Ed. 1957).

II

Whether the option contract secured by plaintiff in this case is sufficiently definite to be the subject of a decree for specific performance is quite another question, which does not concern the validity or existence of the contract but only the nature of the remedy available to plaintiff.

It is not contested by the plaintiff that if it were to accept a lease tendered by defendants in accordance with the contract, there would be numerous complex details left to be worked out. The crucial elements of rate of rental and the amount of space can readily be determined from the Hecht and Woodward & Lothrop leases. But some details of design, construction and price of the building to be occupied by plaintiff at Tyson's Corner would have to be agreed to by the parties, subject to further negotiation and tempered only by the promise of equal terms with other tenants. The question is whether a court of equity will grant specific performance of a contract which has left such substantial terms open for future negotiation.

The defendants have cited a number of cases in support of their argument that a court of equity will not grant specific performance of a contract in which some terms are left for further negotiations by the parties, or which would require a great deal of supervision by the court. I have examined those cases cited which were decided in this jurisdiction, because unless the precedents here establish a clear policy one way or the other, this court may exercise its discretion in fashioning an equitable decree. Moreover, this is an area of law in which not all jurisdictions are in agreement, and whichever way this court were to decide the case, there would be cases holding to the contrary in other parts of the country.

Cleborne v. *Totten*, 61 App.D.C. 69, 57 F.2d 435 (1932), cited by defendants, is not in point. In that case the defendant, lessee under an existing lease, wrote to the plaintiff 11 months prior to the expiration date of the lease to inquire into the possibility of getting a new 3-year lease and also some needed repairs to the leased premises. The letter plainly was not an agreement to enter into a new lease, and the court so held in denying specific performance.

Hearst Radio, Inc. v. *Good*, 67 App.D.C. 250, 91 F.2d 555 (1937), likewise is not in point, for there, too, the court found that the parties, particularly the widow Mrs. L , had not entered into any contract which could be the basis for an action of specific performance.

In *Crowell* v. *Gould*, 68 App.D.C. 297, 96 F.2d 569 (1938), the court denied specific performance of a contract which consisted of five separate writings, which contained internal inconsistencies on the point sought to be specifically enforced, indicating that the parties had not agreed as to the terms of the contract. This also is not in point.

In *Tucker* v. *Warfield*, 73 App.D.C. 278, 119 F.2d 12 (1941), vague provisions in two separate writings illustrate the general difficulty of granting specific performance of a contract for personal services, of a type not at issue in the present case. Cf. *Whitney* v. *Hay*, 181 U.S. 77 (1901), aff'g 15 U.S.App.D.C. 164 (1899).

Melaro v. *Mezzanotte*, 122 U.S.App.D.C. 244, 352 F.2d 720 (1965), held that a Maryland court action denying specific performance of a contract for alleged indefiniteness was not a bar to an action for damages for breach of contract in the District of Columbia. The holding was based on uncertainty in Maryland law whether an action for damages could have been joined with the action for specific performance in Maryland; on the basis of that uncer-

tainty, our Court of Appeals held that the Maryland judgment was not *res judicata*. The case does not provide any guidance for a determination in this case that the contract at issue here is or is not specifically enforceable, and cites no applicable District of Columbia cases.

Thus, defendants have cited no cases in this jurisdiction that would support the contention that an option contract involving further negotiations on details and construction of a building may not be specifically enforced.

On the other hand, the 1926 case of *Morris* v. *Ballard*, 56 App.D.C. 383, 16 F.2d 175, held that an option to purchase property which contained a provision as to price "on terms to be agreed upon" was specifically enforceable by a court of equity. The court in that case held that "it became the duty of defendant, upon proper demand, either to accept the agreed purchase price in cash or to specify such terms as were acceptable to him. He had no right to refuse arbitrarily and unconditionally to accept payment solely for the purpose of defeating the option. Such a refusal would operate as a fraud upon the plaintiff." The court further held that the clause "on terms to be agreed upon"

> "*was in good conscience a stipulation that he would in fact agree with plaintiff upon reasonable terms of payment, and would not arbitrarily refuse to proceed with the sale.* • • • [Emphasis added.] 56 App.D.C. 383, 384.

The court also quoted Pomeroy, Specific Performance § 145 to the following effect:

> "when a contract has been partly performed by the plaintiff, and the defendant has received and enjoys the benefits thereof, and the plaintiff would be virtu-

> ally remediless unless the contract were enforced, the court, from the plainest considerations of equity and common justice, does not regard with favor any objections raised by the defendant merely on the ground of the incompleteness or uncertainty of the agreement." 56 App.D.C. 383, 384.

I therefore hold as a matter of law that the mere fact that a contract, definite in material respects, contains some terms which are subject to further negotiation between plaintiff and defendant will not bar a decree for specific performance, if in the court's discretion specific performance should be granted. *Walsh* v. *Rundlette, supra,* adds further support to this position. See also 5 Williston on Contracts § 1424 (Rev. Ed. 1937).

The question whether a contract which also calls for construction of a building can or should be specifically enforced apparently never has been decided before in this jurisdiction.[3] The parties have cited no cases on this point.

At the outset, it should be noted that where specific performance of such contracts has been granted, the essential criterion has not been the nature or subject of the

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[3] Virginia has allowed specific performance of building contracts. See *Grubb* v. *Starkey*, 90 Va. 631, 20 S.E. 784 (1894), where the Supreme Court of Appeals of Virginia said:

> "[A] court of equity has jurisdiction to enforce specific performance of a contract by a defendant to do defined work upon his own property, in the performance of which the plaintiff has a material interest, and which is not capable of adequate compensation in damages; as, for example, an agreement on the part of a railway company to make an archway under its tracts, or to construct a siding at a particular point for the convenience of an adjoining landowner. 1 Story, Eq. Jr. § 721a; Storer v. Railway Co., 2 Younge & C. Ch. 48; Greene v. Railway Co., L.R. 13 Eq. 44." 20 S.E. 784, 785 (1894).

See also *Chesapeake & Ohio R. Co.* v. *Williams Slate Co.*, 143 Va. 722, 129 S.E. 499 (1925).

contract, but rather the inadequacy or impracticability of legal remedies. See 5 Williston on Contracts § 1423 (Rev. Ed. 1937); 4 Pomeroy's Equity Jurisprudence §§ 1401-1403 (5th Ed. 1941). Contracts involving interests in land or unique chattels generally are specifically enforced because of the clear inadequacy of damages at law for breach of contract. As Pomeroy says:

> "The foundation and measure of the jurisdiction is the desire to do justice, which the legal remedy would fail to give. * * *
>
> " * * * The jurisdiction depending upon this broad principle is exercised in two classes of cases: 1. Where the subject-matter of the contract is of such a special nature, or of such a peculiar value, that the damages, when ascertained according to legal rules, would not be a just and reasonable substitute for or representative of that subject-matter in the hands of the party who is entitled to its benefit; or in other words, where the damages are *inadequate;* 2. Where, from some special and practical features or incidents of the contract inhering either in its subject matter, in its terms, or in the relations of the parties, it is impossible to arrive at a legal measure of damages at all, or at least with any sufficient degree of certainty, so that *no* real compensation can be obtained by means of an action at law; or in other words, where damages are *impracticable.*"

It is apparent from the nature of the contract involved in this case that even were it possible to arrive at a precise measure of damages for breach of a contract to lease a store in a shopping center for a long period of years—which it is not—money damages would in no way compen-

sate the plaintiff for loss of the right to participate in the shopping center enterprise and for the almost incalculable future advantages that might accrue to it as a result of extending its operations into the suburbs. Therefore, I hold that the appropriate remedy in this case is specific performance.

Some jurisdictions in the United States have opposed granting specific performance of contracts for construction of buildings and other contracts requiring extensive supervision of the court, but the better view, and the one which increasingly is being followed in this country, is that such contracts should be specifically enforced unless the difficulties of supervision outweigh the importance of specific performance to the plaintiff. 5 Williston on Contracts § 1423 (Rev. Ed. 1937).* This is particularly true where the

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*Union Pacific Railway Co. v. Chicago, Rock Island & Pacific Railway Co., 163 U.S. 564 (1896); Joy v. St. Louis, 138 U.S. 1 (1890); Wheeling Traction Co. v. Board of Com'rs of Belmont County, Ohio, 248 Fed. 205 (6th Cir. 1918); Great Lakes & St. Lawrence Transp. Co. v. Scranton Coal Co., 239 Fed. 603 (7th Cir. 1917); Gas Securities Co. v. Antaro & Lost Park Reservoir Co., 259 Fed. 423 (8th Cir., cert. denied 250 U.S. 667 (1919); Texas Co. v. Central Fuel Oil Co., 194 Fed. 1 (8th Cir. 1912); Kearns-Gorusch Bottle Co. v. Hartford-Fairmont Co., 1 F.2d 319 (S.D.N.Y. 1921); Board of Com'rs of Mattamuskett Drainage Dist. v. A. V. Wills & Sons, 236 Fed. 362 (E.D.N.C. 1916); Edison Realty Co. v. Bauernschub, 191 Md. 451, 62 A.2d 354 (1948); Laurel Realty Co. v. Himelfarb, 191 Md. 462, 62 A.2d 263 (1948); Brummel v. Clifton Realty Co., 146 Md. 56, 125 A. 905 (1924); Jones v. Parker, 163 Mass. 564, 40 N.E. 1044 (1895); Zygmunt v. Avenue Realty Co., Inc., 108 N.J. Eq. 462, 155 A. 544 (1931); Grayson-Robinson Stores, Inc. v. Iris Construction Corp., 8 N.Y.2d 133, 168 N.E.2d 377 (1960); Strauss v. Estates of Long Beach, 187 App. Div. 876, 176 N.Y.S. 447 (1919); Prospect Park & C.I.R. Co. v. Coney Island B.R. Co., 144 N.Y. 152, 39 N.E. 17 (1894); McDonough v. Southern Oregon Mining Co., Ltd., 177 Or. 136, 159 P.2d 529, 161 P.2d 786, 164 ALR 788 (1945); Rector of St. David's v. Wood, 24 Or. 396, 34 P. 18 (1893); Edison Illuminating Co. v. Eastern Pennsylvania Power Co., 253 Pa. 457, 98 A. 652 (1916); Municipal Gas Co. v. Lone Star Gas Co. (Tex. Civ. App.), 259

construction is to be done on land controlled by the defendant, because in that circumstance the plaintiff cannot employ another contractor to do the construction for him at defendant's expense. In the case at bar, the fact that more than mere construction of a building is involved reinforces the need for specific enforcement of the defendants' duty to perform their entire contractual obligation to the plaintiff.

Cases from an early date have granted specific performance of construction contracts.[5] In *Jones* v. *Parker*, 163 Mass. 564, 40 N.E. 1044 (1895), Justice Holmes commented:

> "There is no universal rule that courts of equity never will enforce a contract which requires some building to be done. They have enforced such contracts from

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S.W. 684 (1924), aff'd 117 Tex. 331, 3 S.W.2d 790 (1928); *Chesapeake & Ohio R. Co.* v. *Williams Slate Co.*, 143 Va. 722, 129 S.E. 499 (1925); *Grubb* v. *Starkey*, 90 Va. 831, 20 S.E. 784 (1894). In accord, Restatement of Contracts § 371, Comment a (1932).

[5] In *Grayson-Robinson Stores, Inc.* v. *Iris Construction Corp.*, 8 N.Y.2d 133, 168 N.E.2d 377 (1960), the Court granted specific performance of an arbitration award to construct a store in a shopping center. This contract was in the form of a written agreement between Grayson and Iris whereby Iris undertook to build on its shopping center tract a building to be rented to Grayson for use as a retail department store for a term of 25 years. The contract contained a clause providing for arbitration of disputes and, when Iris refused to construct the building, Grayson submitted the matter to arbitration. The arbitrators ordered Iris to proceed with construction. Iris refused to obey the award and Grayson took the matter to court. Iris argued that specific enforcement of the award would be contrary to public policy because it would amount to the granting of specific performance of a building contract requiring long-continued supervision of the court. In affirming the decree awarding specific performance, the Court said: "Clearly there is no binding rule that deprives equity of jurisdiction to order specific performance of a building contract. At most there is discretion in the court to refuse such a decree."

the earliest days to the present time." 163 Mass. 564, 40 N.E. 1044, 1045.

Joy v. *St. Louis*, 138 U.S. 1 (1890), is the leading Supreme Court case on specific performance of contracts where the relations between the parties were of a complex nature and might require continuous supervision by the court granting the decree. The Court said on this point:

> "In the present case, it is urged that the court will be called upon to determine from time to time what are reasonable regulations to be made by the Wabash company for the running of trains upon its tracks by the Colorado company. But this is no more than a court of equity is called upon to do whenever it takes charge of the running of a railroad by means of a receiver. Irrespectively of this, the decree is complete in itself and disposes of the controversy; and it is not unusual for a court of equity to take supplemental proceedings to carry out its decree and make it effective under altered circumstances." 138 U.S. 1, 47.

The Supreme Court in *Joy* v. *St. Louis* distinguished the earlier case of *Texas & Pacific Railway Co.* v. *Marshall*, 136 U.S. 393, which is relied upon by defendants herein, because, the Court said, it had held in *Texas* that

> "it was much more consonant to justice that the injury suffered by the city should be compensated by a single judgment in an action at law; that there was no substantial difficulty in ascertaining such compensation; and that, therefore the city had a complete remedy at law. But in the present case, the remedy in damages by an action at law would be entirely inadequate, and nothing short of the interposition of a court of equity

would provide for the exigencies of the situation. See, also, Wilson v. Northhampton &c. Railway Co., L.R. 9 Ch. 279." 138 U.S. 1, 49 (1890).

See also *Union Pacific Railway Co.* v. *Chicago, Rock Island & Pacific Railway Co.*, 163 U.S. 564 (1896), where the Supreme Court commented in a case involving a similarly complex situation:

> "It must not be forgotten that in the increasing complexities of modern business relations equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them. * * * "

The defendants contend that the granting of specific performance in this case will confront the court with insuperable difficulties of supervision, but after reviewing the evidence, I am satisfied that the standards to be observed in construction of the plaintiff's store are set out in the Hecht and Woodward & Lothrop leases with sufficient particularity (Plaintiff's Ex. F) as to make design and approval of plaintiff's store a fairly simple matter, if the parties deal with each other in good faith and expeditiously, as I shall hereafter order.

For example, Article VIII, Sec. 8.1, Paragraph (G) of the Hecht lease (the Woodward & Lothrop lease contains a similar provision) says:

> "The quality of (i) the construction, (ii) the construction components, (iii) the decorative elements (including landscaping irrigation systems for the landscaping) and (iv) the furnishings; and the general architectural character and general design, the materials selection, the decor and the treatment values,

> approach and standards of the Enclosed Mall shall be comparable, at minimum, to the qualities, values, approaches and standards as of the date hereof of the enclosed mall at Topanga Plaza Shopping Center, Los Angeles, California. * * * "

The existing leases contain further detailed specifications which will be identical to those in the lease granted to plaintiff. The site for plaintiff's store has already been settled by the design of the center. Although the exact design of plaintiff's store will not be identical to the design of any other store, it must be remembered that all of the stores are to be part of the same center and subject to its overall design requirements. If the parties are not in good faith able to reach an agreement on certain details, the court will appoint a special master to help settle their differences, unless they prefer voluntarily to submit their disagreements to arbitration.

III

The defendants contend that specific performance of this contract will result in hardship to them, and invoke the maxim that equity will not grant specific performance if the hardship to the defendants is greater than the potential benefit to the plaintiff. Defendants point to the fact that they agreed with Woodward & Lothrop and Hecht in their leases to limit the number of major department stores in the center to three. That means that if a lease is granted to Lansburgh's, defendants will be unable to negotiate a lease with Sears, which has expressed a willingness to be the center's third department store tenant. The Sears lease would be more valuable to them, defendants claim, because the lease would be for a larger amount of

space, and also because Sears would be expected to do a larger business than Lansburgh's, and defendants would receive a percentage share of its profits over a certain minimum amount as part of the agreed rental.

The defendants have not contended that performance of their obligation to Lansburgh's would be impossible or would ruin them financially. In effect, their contention is only that they can make more money by dealing with Sears than with Lansburgh's. This is not a reason for denying specific performance. *Willard* v. *Tayloe*, 75 U.S. 557 (1869). 5 Williston on Contracts § 1425 (Rev. Ed. 1937).

Moreover, the defendants need not have executed leases with both Hecht and Woodward & Lothrop to the exclusion of Sears as a possible additional tenant; nor need they have agreed with Hecht and Woodward & Lothrop that there would be no more than three stores in the center. Plaintiff was not responsible for these actions of defendants and should not be made to suffer irreparable loss due to the limitations which defendants have written into their contracts with Hecht and Woodward & Lothrop and which they now assert as a basis for their refusal to honor their obligation to plaintiff.

The defendants do contend that plaintiff was indirectly responsible, however, in failing to "press its claim" in May of 1964 when defendants advised it by letter that they considered themselves under no contractual obligation to plaintiff. First of all, I find from the record that at all material times the plaintiff through its officers did inform the defendants that it intended to hold them to their contract. Secondly, the defendants in effect imply that the plaintiff, by not "pressing its claim," gave up its rights under the contract, or waived them. But it is elementary contract law that a release of a contractual right (as dis-

tinguished from waiver of a condition) is not valid unless made for a valuable consideration. Finally, in May of 1964 defendants' obligation to tender a lease to plaintiff had not yet ripened because one of the conditions precedent to that obligation—execution of leases with other major tenants—had not yet been satisfied. Plaintiff could not have brought an action for anticipatory breach because of the impossibility of assessing damages; it certainly could not have brought an action for specific performance because as yet there was no specifically enforceable contract right. Plaintiff did contact defendants again when it learned that the Hecht and Woodward & Lothrop leases had been executed; and it brought this suit in a timely manner to prevent the defendants from entering into a lease with Sears which would have precluded them from performing their contract with plaintiff. I therefore hold that plaintiff neither gave up its contractual rights nor unnecessarily delayed its assertion of them in this court.

In its original and amended complaints, the plaintiff sought an injunction and asked for specific performance of the defendants' obligation to tender it a lease for plaintiff's acceptance or rejection. At that time, plaintiff had not seen the Hecht and Woodward & Lothrop leases and consequently lacked information on which to base an exercise of its option. I doubt that a court of equity could or would grant specific performance of a mere tender of a lease. As Williston says:

> "It is true that if an attempt has been made to revoke the offer contained in an option for which consideration has been given or which is under seal, to deny effect to the revocation and treat the offer as irrevocable is equivalent to a preliminary specific performance, but it is not effected by a decree in equity.

A court of law as well as a court of equity assumes the irrevocability of such offers." 5 Williston on Contracts § 1441 (Rev. Ed. 1937).

As the author points out, it is the bilateral contract which arises upon the exercise by plaintiff of the option that is specifically enforced.

During the course of this proceeding, the plaintiff has examined the leases executed between defendants and Hecht and Woodward & Lothrop and has indicated its willingness to accept a lease with terms equal to the Hecht lease. I therefore find that the plaintiff has exercised its option, and is entitled to specific performance of a lease on terms equal to those contained in the Hecht lease.[6]

.....

Judge

April , 1967.

[6] See *Chrysler Motors Corp.* v. *Tom Livizes Real Estate, Inc.*, 210 A.2d 299 (Del. Ch. 1965), where a suit for specific performance of an option to purchase real estate was instituted before the option was exercised, but the option was exercised during the course of the proceeding. Chancellor Seitz commented: "I think the action at that time must be viewed as one in effect seeking a judicial declaration that the option was still valid and binding despite defendant's attempt to revoke it." Specific performance was granted.

APPENDIX D

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 98-66

CITY STORES COMPANY,

Plaintiff,

v.

H. MAX AMMERMAN, *et al.*,

Defendants.

Supplemental Memorandum

Robert Martin, Alexander B. Hawes, and Richard Shlakman, of Leva, Hawes, Symington, Martin & Oppenheimer; and Richard K. Lyon, all of Washington, D. C., for Plaintiff.

H. Max Ammerman; and Edgar H. Brenner and Melvin Spaeth of Arnold & Porter, all of Washington, D. C., for Defendants.

Following the entry of the Court's Opinion in this proceeding on April 5, 1967, plaintiff submitted a proposed Order for Specific Performance. The defendants then were given an opportunity to object to the proposed Order; the plaintiff was given an opportunity to reply to the defendants' objections; defendants next wrote a letter to the Court stating what, in its view, the issues were; both parties then were given a hearing during which they ar-

gued their respective positions and defendants were allowed to put on a witness in support of one of their arguments; and finally, following submission by plaintiff of a proposal intended to meet defendants' chief objection to the proposed Order, the Court received and considered two letters of further comment from defendants.

As a result of this extended discussion, defendants disagreement with the Order the Court will enter today has become both narrow and clear. It consists primarily of two contentions: (1) That plaintiff should be required to pay the same dollar amount of rent as The Hecht Company rather than the same *rate* of rental required of both The Hecht Company and Woodward & Lothrop; and (2) that defendants should not be required to sign a lease until after they have negotiated with plaintiff as to the final design and construction cost of plaintiff's building.

In answer to the first contention, the Court need only point out that both the Hecht and Woodward & Lothrop leases fix their rental at a certain rate per square foot plus a percentage amount of gross earnings over a certain dollar amount each year. Had the intention of defendants as expressed in those leases been to exact a flat dollar amount of rent from each of its tenants, it would have been reasonable to require plaintiff to pay the same dollar amount. However, the yearly dollar totals for each store may vary, depending upon the amount of business the stores do each year. Each of the Center's department store tenants will pay the same basic rent, since each of them will have the same amount of space measured in square feet, and each will pay the same rent per square foot. What the defendants' argument comes down to is one they made during the trial; they do not expect plaintiff to do as much business as some other tenant in the Center might be able to

do, and hence they say it is "inequitable" to require them to rent to plaintiff the space in question unless the rental is gauged by the dollar value of the Hecht lease. The argument is not premised on any showing of financial impossibility. Indeed, there has been no showing that the basic rental will fail to provide them with an adequate rate of return on their investment, nor is there anything more than defendants own speculation in the record that plaintiff will not do a sufficient volume of business to pay them more than the basic amount of rent. It will be even more to plaintiff's advantage than defendants' to surpass the stated annual gross sales. Defendants have failed to persuade the Court that there is any tenable basis in the record for their argument.

In answer to the second contention, defendants object to the Court's requirement of specific performance of a lease, which will be attached to and made a part of the Court's Order. The defendants would prefer the Court to order instead that they merely *negotiate* the terms of a lease with the plaintiff. However, as the Court's Opinion made clear, the defendants contracted with plaintiff for a lease, and the Court will Order specific performance of that contract. The terms of a lease are clearly ascertainable from material of record, and most specifically, from the terms of the Hecht and Woodward & Lothrop leases which defendants have already entered into. The lease to be attached to the Order is, in fact, a copy of those leases with such minor modifications as are necessary to adapt the document to plaintiff and to the third department store site in the Center. One additional change has been made as a matter of accommodation to the defendants, and that is, plaintiff will be required to supply defendants' architects with schematic drawings of the exterior design of plaintiff's buildings (Exhibit J and J-1) within 30 days of

the execution of the lease. Thus, plaintiff will provide defendants with details of both the exterior and interior (Exhibit D) design of the building.

Defendants complain that without pre-lease negotiations they will be unable to determine the cost of the building, but the answer to this argument is clear from the fact that the plaintiff is to receive a building "equal to" the Hecht building and one that is to be of the same dimensions as the Hecht building. The defendants thus will be expected to construct for the plaintiff a building that costs substantially the same amount of money as that built for The Hecht Company. The fact that buildings are being built by defendants for Hecht and Woodward & Lothrop and that they are of different exterior and interior designs is proof (if any were needed) that the same lease is equally adaptable to a third and yet different store building.

In summary, after hearing and reading extensive arguments from both parties, the Court is convinced that the minor negotiations that yet remain can be conducted easily within the confines of a lease, and that the defendants' leases with The Hecht Company and Woodward & Lothrop contain the identical negotiation problems and provisions as that proposed for plaintiff. Those leases are integrated documents, and hence defendants' argument that they were conditioned on the pre-lease provision by the tenants of detailed construction drawings of other store buildings which were to serve as models for the Tyson's Center stores—construction drawings nowhere mentioned in the leases themselves—is not persuasive. The Court instead is convinced that to the extent such drawings were made available, it was simply for the advantage of the tenants, who wished to have their stores at Tyson's Corner resemble those at the Landmark shopping center. Plaintiff makes

no such demand. Its lease will provide, however, that it supply defendants with complete guidance as to the desired interior and exterior design and layout of its store. Moreover, the lease will contain the identical cooperation clause as both the Hecht and Woodward & Lothrop leases. The Order for Specific Performance of a lease thus sets fixed limits for a store building, within which the parties' architects can devise final designs from the potential combinations and variations of ideas at their disposal. The Court need not tell the parties what color brick to use, or where to put the windows.

.....

Judge

APPENDIX E

May 29, 1962

Mr. Isadore Gudelsky
Mr. Theodore N. Lerner
6406 Georgia Avenue, N.W.
Washington, D. C.

Dear Mr. Gudelsky and Mr. Lerner:

In view of our several discussions on the Tyson's Corner area as a place for a Regional Shopping Center, I am pleased to say that we have now completed our rather exhaustive surveys and are in a position to give you our firm position on the subject.

We are convinced that the Gudelsky-Lerner tract, to which you refer as the Tyson's Triangle, is superior to any other. Being located on the Beltway, it has an unexcelled advertising value. Its location on both Route 7 and Route 123 gives it access to all local traffic.

Since the Tyson's Triangle site will be developed almost exclusively to commercial uses, it also assures a live center with no dead spots. It is also readily available to automobile traffic without other competing uses within the Triangle.

If you and your associates gain approval to build a Regional Shopping Center on this property, Lansburgh's would be very interested in becoming a major tenant with a full line department store. This interest is, however, restricted to this particular location only and is further conditional upon there being only one regional center in the Tyson's Corner area.

Sincerely yours,

APPENDIX F

Mr. Charles H. Jagels

Dear Mr. Jagels:

We very much appreciate the efforts which you have expended in endeavoring to assist Mr. Gudelsky and me in our application for zoning at Tyson's Corner for a Regional Shopping Center.

You have our assurance that in the event we are successful with our application, that we will give you the opportunity to become one of our contemplated center's major tenants with rental and terms at least equal to that of any other major department store in the center.

Sincerely yours,

ISADORE M. GUDELSKY

THEODORE N. LERNER

APPENDIX G

Mr. Gustave Amsterdam
City Stores Company
132 West 31st Street
New York 1, New York

Dear Gus:

Attached is copy of the letter we sent to the Gudelsky group in connection with Tysons Corner and a copy of their reply to us, committing themselves to Lansburg's as a major tenant in the area. Also enclosed is a copy of the news release on the Center.

Fortunately, the Gudelsky tract was selected by the Commission on Thursday by a vote of 4 to 2. I would appreciate your bringing Dede up to date on this activity which occurred while he was abroad.

Best regards.

Sincerely,

JAKE

APPENDIX H

June 7, 1962

Mr. Charles H. Jagels, President
Lansburgh's
Washington, D. C.

Dear Jake:

Sorry your letter of June 4 got to me in Philadelphia instead of New York. However, I find that you caught up with Dede and gave him the story. I think you are in an interesting, perhaps even an advantageous, position. I shall be watching with unusual interest further developments.

Good luck!

Sincerely,

GUSTAVE G. AMSTERDAM

GGA/pcb

APPENDIX I

April 29, 1965

The May Department Stores Company
650 South Spring Street
Los Angeles, California

—and—

Woodward & Lothrop Incorporated
10th to 11th Streets—F and
G Streets, Northwest
Washington, D.C.

Gentlemen:

This letter is written to you jointly pursuant to the understanding among us that your proposed respective leases for stores in our Tyson's Corner Regional Shopping Center, in Fairfax County, Virginia, shall be as similar as possible, with variances in your respective leases only as to exhibits pertaining to location, plans and specifications and any other matter which of necessity must be applicable only to one of you, but the contents of both leases shall be subject to your joint approval, it being further understood that neither lease aforesaid shall be amended without the approval of the other tenant.

The following numbered paragraphs hereto state our general understanding in respect of the matters therein provided for, subject to such changes as will be required in the process of incorporating such matters in a formal lease and relating and integrating such matters to and in, respectively, other provisions of the lease. It is under-

stood that there are other major, substantive matters which will form part of your lease, and as to which an understanding has not yet been reached. It is our intention that the remaining matters be discussed among counsel in the process of preparing a lease, during which time the various exhibits required to be attached to and made a part of the lease can be prepared and approved. It is understood that the dollar items stated herein apply to each of you.

1. The general locations of your respective stores and of the enclosed Mall between your stores have been agreed upon (the configurations thereof, however, to be decided upon prior to execution of a lease) and will be shown on the exhibit site plan as Store A for Hecht Company and Store B for Woodward & Lothrop. Each store will contain initially approximately 150,000 square feet of floor area, plus a location for a TBA and outdoor selling area, (either or both of which we will construct for either of you at your request), with the right to expand upwards (at our cost for construction of such additional floor) into an additional store building floor at any time, provided at least fifteen years remain during the lease term (including renewals), and if less than fifteen years remain, you may exercise an option for a renewal term or agree to extend your lease so that the lease shall not end prior to fifteen years (provided the lease may not be extended beyond the maximum period provided for therein).

2. The proposed lease shall provide for an original term of thirty (30) years plus options of three renewal terms of ten (10) years each and a fourth renewal term for the balance of our lease with the owners of the land on which the Shopping Center is to be built. Copies of our lease aforesaid have been delivered to you. At or prior to the

time of our executing the lease contemplated herein, we will exercise our option with our landlord to renew as described in our said lease.

3. (a) The annual minimum rental shall be at the rate of $1.55 per square foot for the store premises, including TBA and outdoor selling area, if any, plus 10¢ per square foot of floor area of each store, as such floor area shall be from time to time, as common area maintenance charge. We will maintain and operate the common areas at our own cost and expense.

(b) The annual minimum rental shall be credited against an annual percentage rental based upon the following formulae:

(i) During the period ending with the fifth tax year referred to in 3(d) hereof, the annual percentage rental shall be as follows:

2¼% of gross sales to breaking point;
2% on next $2,000,000;
1½% on next $2,000,000;
1% on next $2,000,000;

No percentage rental on gross sales in excess of the aforesaid.

(ii) After the expiration of the period referred to in the preceding paragraph 3(b)(i), the annual percentage rental shall be as follows:

2⅜% of gross sales to breaking point;
2% on next $2,000,000;
1½% on next $2,000,000;
1% on next $2,000,000;

No percentage rental on gross sales in excess of the aforesaid.

(c) There shall be no minimum annual rental for any renewal term (except as provided in Paragraph 3(f) hereof) and the percentage rental for any renewal term shall be 50% of the percentage rental as scheduled hereinabove in Paragraph 3(b).

(d) Subject to a maximum of 21½¢ per square foot of floor area, you will pay real estate tax increases on your respective leased property during the third, fourth and fifth tax years over the amount of such taxes paid for the second tax year occurring after all improvements to be initially constructed have been completed as contemplated in our lease, provided, however that no taxes imposed on property not assessed during the second tax year shall be used as a basis for computing a tax increase for which you are liable on this property. Tax increase payments aforesaid shall be deducted annually against percentage rental paid and tax increase payments shall not be cumulative against such percentage rental.

In the event of a foreclosure, you shall pay real estate tax increases on your respective leased property based on the following: (1) the base tax year would be the fifth tax year in which the applicable assessments fully reflect all improvements made to the demised premises; and (2) the percentage rent payable shall be the same as stated in Paragraph 3(b)(i) hereof. Any real estate tax increase payments shall be deducted from percentage rental, on a cumulative basis.

(e) You will pay annually one-half cents (½¢) per square fot of your principal store area for heat, ventilation and air-conditioning of the Mall.

(f) In the event of the expansion of your stores, then the following provisions shall apply:

(i) If such expansion shall occur after the first five years of your original lease term, your minimum rental of $1.55 per square foot for the additional floor shall be adjusted (C.P.I.) as to reflect the increase between the expiration of said first five year term and the date of commencement of payment of the new rental.

(ii) If such expansion shall occur at a time requiring you to be under lease obligations for fifteen years, as provided in Paragraph 1 hereof, then during that period of the fifteen years, you will pay the minimum rental aforesaid for the expanded area.

(g) You will join a Merchant's Association, which we will organize (after your approval of charter and By-Laws, which we cannot amend without your further approval), and each make a contribution to it of 12½% of its annual budget with a maximum of $5,000. We will contribute 17½% of the amount of such budget with a minimum payment of $15,000, and we will require our other tenants collectively to contribute a minimum of $20,000.00.

(h) You will agree to operate or cause to be operated as a retail facility your store premises during the whole of the original term of said lease.

4. (a) The grand opening of the Center is contemplated for August 1, 1967, at which time we shall have leased and have ready for an approximate simultaneous opening a minimum of 100,000 square feet of store area in the Mall area between your two stores.

(b) In addition to your two stores, we shall construct initially all of the store area between your two stores,

including a closed, heated, ventilated and air-conditioned Mall.

(c)(i) We shall have the right at any time to enter into a lease with any of the department stores shown on the attached "List One"; (ii) we shall have the right at any time after eighteen months following your opening for business to execute a lease with any department store shown on a "List Two" (which is to be prepared and agreed among the parties prior to the execution of the lease contemplated hereby); and (iii) after a period of one year following your opening for business you shall have a period of six months within which to endeavor to interest any of the department stores appearing on "List One" to occupy the store site for the third department store shown on site plan.

The lease for such third department store will not be made on terms more favorable than your leases nor shall such store ever have a gross floor area of less than 150,000 square feet, exclusive of TBA and outdoor selling area, nor at any time in excess of that of the smaller of your stores.

5. A parking area ratio shall be maintained for the Mall stores, including department stores as well as TBA's and outdoor selling areas, and any other retail facilities irrespective of locations on the Shopping Center site, in accordance with the provisions of the Fairfax County ordinance which now exists. With respect, however, to structures hereafter erected in the "reserved areas" as shown on the exhibit, "Site Plan", for the year 1965, non-retail in character, you will not expect us to maintain parking ratio greater than the applicable County ordinance may from time to time require.

6. It is understood that you, at your own cost and expense, shall be able to obtain a standard premium leasehold policy of title insurance in an amount equal to the reasonable value of your leasehold interest insuring that your leasehold title is good and valid. We shall make reasonable efforts to secure amendments to our ground lease in order to meet such requirements, if any, imposed by the title company issuing the said policy of title insurance, in respect of any necessary changes in the ground lease required in order to issue such policy of title insurance.

It is understood that this letter constitutes a letter of intention on our part and when you have signed a copy hereof and returned same to us, same shall constitute an indication of your intention and it is further understood that this letter or any part hereof or any provisions hereof shall not in any manner whatsoever (i) impose any liability on you or us and/or (ii) result in any right or claim by one against the other and/or (iii) bind you or us. We acknowledge that we have been advised that authority to enter into the contemplated leases aforesaid must come from your respective Board of Directors.

Very truly yours,

Tyson's Corner Regional Shopping Center

By /s/ Theodore N. Lerner
Theodore N. Lerner, Partner

Dated: April 29, 1965.

THE MAY DEPARTMENT STORES COMPANY

By s (Signature Illegible)

WOODWARD & LOTHROP INCORPORATED

By s (Signature Illegible)
s NATHANIEL J. ABRAMS

"LIST ONE"

Nieman-Marcus

Saks Fifth Avenue

Lord & Taylor

I. Magnin

Garfinckel

Ward's

Sears

J.C.Penney Co.

[Handwritten notation—One—(A pair of illegible initials)]

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,097

H. MAX AMMERMAN, *et al.*,

Appellants,

v.

CITY STORES COMPANY,

Appellee.

On Appeal from the United States District Court
for the District of Columbia

Of Counsel:

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Dated: August 28, 1967

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Attorneys for Appellee

QUESTIONS PRESENTED

In appellee's view, the questions presented are:

(1) Whether promisors should be held to a written promise signed by both of them assuring promisee (appellee) of the opportunity to become a major department store tenant in a contemplated new shopping center on terms at least equal to those of any other such store in the center, where promisee in exchange gave promisors its written expert opinion which was used by promisors in a highly competitive zoning proceeding, and where no personal influence by promisee in that proceeding was contemplated or used?

(2) Was it clearly erroneous for the District Court to find:

(a) Based largely on the credibility of witnesses heard by him in open court, that promisors' written promise and promisee's opinion letter were *quid pro quos* creating a binding option?

(b) That consideration for the written promise and its performance were established by the evidence, thereby satisfying the Statute of Frauds?

(c) That at all material times promisee asserted its claim and then brought suit promptly after promisors' execution of leases with similar tenants?

(3) Did the District Court abuse its discretion in ordering promisors to execute a lease with promisee where detailed leases with similar tenants provided the elements of certainty and feasibility of an equal lease?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,097

H. MAX AMMERMAN, *et al.*,

Appellants,

v.

CITY STORES COMPANY,

Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In their brief, appellants seek to discredit the agreement they made with appellee by depicting it as a rather casual, non-reciprocal arrangement, lacking in business sense. They imply the court's findings were based upon unreliable testimony not even heard by the trial judge.

In fact the situation is quite different. The agreement was deliberately entered into and made good business sense. The trial judge heard all the important witnesses in open court. His findings necessarily decided credibility questions in favor of appellee's witnesses.

This counterstatement of the case is necessary because appellants appear to seek to have this case considered *de novo* in this Court. Key facts, omitted or glossed over by appellants, give quite a different impression from the one they have sought to create. Most of their contentions rely upon allegations of fact contrary to the facts as found by the District Court.[1] Also, contrary to what the lengths of the briefs and the size of the record might suggest, the central issue in this case is really quite a simple one: whether a deliberately undertaken and certain contractual obligation should be enforced in the face of a series of insubstantial technical objections?

Summary of the Case

Appellants are the developers of a very large and unique shopping center at Tyson's Corner, Fairfax County, Virginia, and the successors in interest to appellant Lerner and the late Isadore Gudelsky. Appellee, City Stores Company, owns and operates chains of retail stores, of which Lansburgh's is the department store division for the Washington D.C. metropolitan area.

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[1] The District Court's opinion is printed as Appendix C to appellants' brief. Its Supplemental Memorandum, issued in connection with the Order of specific performance, is printed as Appendix D. References to the Appendices to appellants' brief will consist of the page number followed by "a". Reference to the Appendix to appellee's brief will consist of the page number followed by "A". Citations to the record will cite the folder pages ("F. __") only.

In 1962 Lerner and Gudelsky signed a document which, by its express terms, assured Lansburgh's of the opportunity to become a major department store tenant in the then proposed Tyson's Corner Regional Shopping Center at rental and terms at least equal to those of any other such tenant (Appellants' brief, Appendix F). Appellee's witnesses testified, and the documents confirmed, that this written promise was given as the contractual exchange for Lansburgh's assistance in a Fairfax County Zoning proceeding relating to Tyson's Corner. Appellants testified to the contrary and claimed that the written assurance did not mean what it clearly said.

The District Court, having heard witnesses for both parties in open court, rejected appellants' testimony, finding that this explicit promise in writing, bearing two signatures, was intended to be a binding option and was given as the *quid pro quo* for good and valuable consideration. Appellee having exercised this option for an equal lease, the District Court specifically enforced it, holding that leases entered into by appellants with the May Company (Hecht's) and Woodward & Lothrop for department stores at Tyson's Corner provided a precise definition of the equal lease to be given appellee. (Opinion, pp. 13a-15a, 31a-32a; Supp. Memo., pp. 38a-39a.)

Nature of Agreement Between the Parties in May 1962

In late May 1962, the Lerner-Gudelsky group was interested in Lansburgh's as a prospective tenant for its various shopping centers and many discussions to that end had already taken place. (Opinion, p. 12a; F. 1267, 1849.) Shortly before May 31, 1962, Mr. Lerner requested of Mr. Charles Jagels, the then President of Lansburgh's, that Lansburgh's furnish to Gudelsky and Lerner a written statement

of opinion favoring appellants' position for use in the critical zoning proceeding relating to Tyson's Corner. The Lansburgh's opinion was to reflect the conclusions it previously had reached, based upon its independent studies of the Tyson's Corner area, to the effect that the Gudelsky-Lerner tract of land was preferable to a nearby competitive tract (the Rouse tract) for use as a regional shopping center. (Opinion, pp. 12a-13a, F. 1267-1268, 1130-1131, 1126-1127, 1254-1255.)

Jagels agreed to furnish this assistance, provided that Lerner and Gudelsky, in return, if they were successful in the zoning proceedings, would offer Lansburgh's a lease at Tyson's Corner equal to that given any other major department store tenant. The court found that Lerner assented to this. (Opinion, pp. 13a-14a; F. 1268, 1931, 1216-1217, 1129-1137, 1104-1105.) Because Jagels required it, written assurance to this effect, signed by both Lerner, the junior partner, and Gudelsky, the senior partner, was to be given Lansburgh's in exchange for its opinion letter. (F. 1645-1646, 1268-1269.)

On May 29, 1962, Lerner was given the Lansburgh's opinion letter, signed by Mr. Jagels (Opinion, p. 15a; F. 2027, 1930-1931, 1269.) In return, Lansburgh's received the promised written assurance signed by both Mr. Lerner and Mr. Gudelsky — *i.e.*, "assurance that . . . we will give you the opportunity to become one of our contemplated center's major tenants with rental and terms at least equal to that of any other major department store in the center" — which was conditioned upon Lerner and Gudelsky being successful in their zoning endeavors. (Opinion, p 14a; Appellants' brief, App. F; F. 1282, 1931, 1217-1218.) This condition was, of course, necessary because without the zoning change, no shopping center would be built. Moreover, Lerner and Gudelsky did not own the tract in question, their arrangement with the owners of the land being itself predicated on their obtaining shopping center zoning approval. (F. 1840-1842.)

Value of Consideration Furnished by Appellee

The record makes clear why Lerner and Gudelsky were willing to give Lansburgh's an option for a lease in exchange for its assistance in the zoning proceeding. Since major shopping centers are built around the department store tenants, the informed opinions of such stores are sought after for use in securing the necessary zoning. (F. 1842-1848, 1542, 404; see also, *e.g.*, F. 2191-2193, 1998-1999, 2000-2001.)[2] But where, as here, there are two or more applications, department stores are reluctant to take a position as between the competing tracts. (F. 2198.) Expressing a preference for the eventual loser might jeopardize the store's future relationship with the successful applicant. (F. 1146-1147, 1234-1235.) As the Court found, the Hecht Company and Woodward & Lothrop (both eventual department store tenants) had declined to express a preference in the Tyson's Corner zoning case, and Lansburgh's had not previously done so in any zoning proceeding. (Opinion, pp. 12a-13a; F. 333-334, 394, 1254.)

At the time Lerner and Gudelsky sought and obtained Lansburgh's written opinion of preference for their tract, they were in serious need of all possible supporting evidence. As the District Court found, their posture in the zoning proceeding then was most precarious. (Opinion, p. 12a.) The Fairfax County Planning Commission and Staff had recommended adversely to their tract, and the critical public hearing before the Board of Supervisors was but two days away. (Opinion, p. 12a; F. 1025-1026, 2164-2166, 2214-2218, 2155.) If the decision as a result of that hearing was unfavorable, the entire interest of Lerner and Gudelsky in Tyson's Corner would be lost. (F. 1840-1842.)

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[2] Appellant Lerner was specifically instructed to seek such opinions (F. 1542, 404) and has sought such opinions even in uncontested zoning proceedings. (F. 405-410, 1545-1551.)

At the May 31 hearing, however, Lerner and Gudelsky were successful, the Board ruling in their favor and against the Rouse tract by a divided 4-2 vote. (F. 2156-2158.) The record of the hearing demonstrates that counsel for Lerner and Gudelsky used the Lansburgh's opinion letter as effective support for their case. (F. 1637-1641, 2195-2197.)[3]

Subsequent Events, 1962-1965

In July 1962 and in obvious reliance on obtaining a lease at the Lerner-Gudelsky tract at Tyson's Corner, Lansburgh's rendered additional assistance at Mr. Lerner's request. Subsequent to the May 31 ruling in favor of the Lerner-Gudelsky interests, the Rouse group had proposed that even though the Lerner-Gudelsky tract had been rezoned for shopping center use, their tract should also be approved for such use. (F. 1889-1890, 2198-2208.) At Mr. Lerner's request, Lansburgh's wrote a letter to the Fairfax County Board of Supervisors reconfirming the position stated in its May 29th letter that the area could support only one such shopping center. (F. 427, 2033, 1891, 328.) The Board subsequently denied the Rouse application. (F. 428.)[4]

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[3] A witness from Lansburgh's was also present at the hearing for the same purpose, but it did not prove necessary to call him. (F. 1107, 1209.)

[4] The Board also briefly had called upon a witness from Lansburgh's who was present at the hearing to testify as to Lansburgh's position. (F. 2209-2213, 1960-1961.) The Chairman of the Board of Supervisors informed Lansburgh's of this action by letter, thanked Lansburgh's for its views, and expressed pleasure that Lansburgh's would have a store in Fairfax County. (F. 428.)

Thereafter, through 1963, plans for the shopping center went slowly forward. The developers were uncertain as to whether they would have three or four department stores but, in either event, they indicated that Lansburgh's would be included. (F. 1861-1862, 1051-1053, 2055-2056, 395, 2100.) At a meeting in late 1963, Mr. Gudelsky, in Mr. Lerner's presence, confirmed to Mr. Amsterdam (appellee's Chairman) the obligation to give Lansburgh's the lease it was seeking. (F. 1239-1242, 1972-1974; compare Mr. Lerner's three different versions of this meeting, F. 1047-1051, with F. 1593 and F. 1595.)

Shortly after that meeting Mr. Gudelsky died. In April 1964, as a result of conversations with appellant Lerner, Lansburgh's wrote Lerner that Lansburgh's considered the obligation of an equal lease binding, and intended to enforce it. (F. 432.) A month later appellants asserted for the first time that Lansburgh's was not legally entitled to a lease, the only reason given being the requirements of the Statute of Frauds. (F. 433.) Nevertheless, appellee continued to press for a lease (F. 434-436), and it is undisputed that at no time through the end of 1965 did appellants state that Lansburgh's would not be tendered a lease.[5] (F. 1861-1862, 2107-2108, 1994-1997, 2008-2009.)

While in January 1965 appellants were contemplating Lansburgh's inclusion in the center (F. 2100), in the spring of 1965, unknown to appellee, appellants entered into non-binding letters of intent for department store leases at Tyson's Corner with Hecht's and Woodward & Lothrop which made no provision for Lansburgh's. (F. 379-391.) In June 1965, when news of the letters of intent became public, appellee

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[5] During much of the period appellants stated that the store composition of the center was undecided. In much of 1964-65 the management of the center was in doubt, including Mr. Lerner's tenure, which was not settled until the spring of 1965. (F. 2002-2007, 2010-2012, 1985-1992, 2098-2099.)

promptly re-asserted its right to a lease in writing and threatened litigation. (F. 2022-2023, 2025.) Appellants took the position that performance of the obligation to appellee had to await execution of leases with Hecht's and Woodward & Lothrop, which thus would define the contents of an "equal" lease. (F. 1994-1997.)

In September 1965, Mr. Lerner advised appellee that the matter of the Lansburgh's lease would have to be considered by appellants' partnership. (F. 1953-1958, 1944.) Thereafter, appellee notified Hecht's and Woodward & Lothrop of its claim of right to a lease. As a result, these stores revised their draft leases with appellants to approve Lansburgh's, in addition to Sears, for the third site, and so informed appellee when the leases were executed in late December 1965. (F. 2131, 1831, 2026, 1948-1952.)

In December 1965, appellants decided to offer a lease to Sears, Roebuck & Company for the remaining site. (F. 2114, 2013-2015.) On January 5, 1966, they made a proposal to Sears of a lease similar in all respects to the Hecht's and Woodward & Lothrop leases, except for differences as to location, exhibits pertaining to the store, and omission of unnecessary clauses. (F. 2057.) Appellee, after unsuccessfully seeking to obtain the promised lease in early January, filed this action for specific performance on January 14, 1966.

Appellant Lerner's Testimony

What unduly complicated the record in this otherwise simple contract case was a series of contentions made by appellants, primarily through Lerner's testimony, disputing many of the circumstances that otherwise seemed quite clear, as follows:

— Appellants claimed that the assistance of Lansburgh's was volunteered in order to obtain certain help from Messrs. Lerner and Gudelsky relating to another shopping center they controlled (F. 1576, 1850-1851), even though, as the District Court found, this problem did not arise until months after the transaction here involved. (Opinion, p. 13a.)[6]

— Similarly, Mr. Lerner claimed that the written assurance, solemnly signed by himself and Mr. Gudelsky, was given merely as a favor to Mr. Jagels, whose employment Mr. Lerner erroneously claimed was in jeopardy, as a nice letter to show his employers. (F. 1565-1566, 1574-1575; see inconsistent Lerner testimony at F. 1883-1885.)[7]

— Further, Mr. Lerner testified that, in any event, the written assurance was not a promise of an equal lease, but was intended to mean a number of other things. Lerner admitted, however, that none were expressed either in the writing or in his conversations with Mr. Jagels. (F. 1568, 1659-1660, 1044-1045.)[8]

— Mr. Lerner also testified that to give an option for a lease in return for Lansburgh's assistance in the zoning proceeding would not make business sense. He claimed incorrectly that it would jeopardize obtaining leases from other department stores and would make financing the center impossible (F. 1529-1530), whereas, the financing and the other leases, in fact, were obtained with knowledge of Lansburgh's asserted option. (F. 379-391, 1948-1949, 2131, 2026.)

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[6] See pp. 1A-6A, infra.

[7] See pp. 11A-13A, infra.

[8] See also pp. 7A-10A, infra.

— Finally, appellants sought to show how minor Lansburgh's assistance was in comparison with the supposed great value of an option for a lease at a time when their zoning situation, as described above, was most precarious.

All of these contentions were rejected by the trial judge on the basis of appellee's ample testimony and documentary evidence to the contrary, and on the basis of the trial judge's appraisal of the testimony given by Mr. Lerner and appellants' other witnesses.

The Proceedings Below

The proceedings below, in all of which appellee prevailed, included separate hearings on appellee's motions for a temporary restraining order and preliminary injunction, a full trial on the merits, and hearings on the Court's order. The same District Court Judge (the Honorable Oliver J. Gasch) who heard the motion for a temporary restraining order, heard all subsequent phases of the case. The transcripts of the testimony given in open court before him in the restraining order and preliminary injunction proceedings, where appellee's principal witnesses testified, were placed in the record at the trial to avoid needless duplication of testimony already heard. (F 1512-1513, 1517, 1519-1522, 1821-1822.)[9] The five full days of trial itself consisted primarily of the testimony of appellants' witnesses.

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[9] Appellants agreed to this procedure. (F. 1822, 1519-1520.)

Based upon all the testimony and pertinent documents, the District Court's decision held that appellants were obligated to perform their written promise to give appellee a lease equal to those signed with the two other department stores. It rejected appellants' contentions that there was no contract, that the contract was unenforceable under the Statute of Frauds, that specific performance was barred by laches, and that the contract was too indefinite to be specifically enforceable. (Opinion, pp. 14a-15a, 33a-34a, 26a, 28a; Supp. Memo., p. 38a-39a.)

The District Court thereupon enjoined appellants from leasing the one remaining department store site to anyone other than appellee, and ordered them to execute a lease (already executed by appellee) which is a part of the order appealed from. (F., Vol. I.) That lease is virtually identical with the Hecht's lease, including precise size, precise shape and most detailed construction specifications of the department store building (with minor exceptions dictated by the names of the parties to the lease, the location of appellee's store in the center, and the different date of execution of the lease). (Compare the lease attached to the Court's order with Pl. Ex. F.) As the trial court found, nothing is left which requires any substantial negotiation of the parties, and such negotiations as remain may occur within the confines of a lease which provides clear standards for performance, or for judicial supervision if the parties cannot agree. (Opinion, pp. 31a-32a; Supp. Memo., pp. 38a-39a.)

SUMMARY OF ARGUMENT

I

The basic issues in this case are factual, dependent largely on the credibility of the witnesses below as to the circumstances under which the critical documents in this case were exchanged. These

issues were resolved in appellee's favor by the trial judge based on an extensive record, and after hearing the principal witnesses for both parties in open court.

It is undisputed that appellants' predecessors in interest, appellant Lerner and the late Isadore Gudelsky, signed and gave appellee a written "assurance" of the "opportunity to become one of our contemplated center's major tenants with rental and terms at least equal to that of any other major department store in the center."[10] It is also undisputed that appellee gave appellants assistance in the competitive Tyson's Corner zoning proceedings in the form of a written opinion stating why their tract was preferable to the competitive tract for shopping center use,[11] and that appellants utilized this opinion in the zoning proceedings. A direct issue of credibility was presented as to whether the promise and the assistance were *quid pro quos*.

The trial court's finding that the assistance was the consideration for the promise was implicit in the documents. It was made explicit by the testimony of disinterested witnesses for appellee heard by the trial judge. (F. 1268-1269, 1931.) The business sense of the transaction was confirmed by the precarious status of appellants' zoning situation at the time they sought and obtained this assistance, the importance of affirmative opinions of department stores in such zoning proceedings, and the fact that appellants at the time desired appellee as a tenant in their shopping centers.

The appellants claimed that the document was not intended to mean what it clearly states, but their interpretation was not supported by credible evidence. Appellants were compelled to admit on

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[10] Appellants' brief, App. F.

[11] Appellants' brief, App. E.

cross-examination that their claimed meaning of the promise departed from the plain language of the document (F.1650-1659), and that their strained interpretation was never communicated to appellee. (F. 1647-1648, 1651-1652, 1859-1860.) The District Court correctly concluded, based on the language of the written promise, as well as the testimony and circumstances, that it was intended to be and, in fact, was a binding option for a lease.

II

The District Court's order of specific performance is entirely proper. At the time the option was given, leases with other department stores for the shopping center did not exist; at that time, therefore, the contents of the "equal" lease promised could not have been ascertained. In December 1965, appellants entered into substantially identical leases for two of the three department store sites at Tyson's Corner. (F. 2111.) The District Court correctly determined that with the existence of such leases to define and measure equality, there was nothing uncertain in the option. It correctly ordered appellants to execute a specific lease, attached to its Order, which as it stated in its Supplemental Memorandum "is, in fact, a copy of those leases with such minor modifications as are necessary to adapt the document to plaintiff and to the third department store site in the center." Where identity was not possible, the ordered lease is equal to the Hecht's lease. This includes store design where the District Court found the lease sets "fixed limits." (Supp. Memo., p. 40a.)

The District Court's determination that judicial supervision, if required, will not be unduly burdensome, was not an abuse of its discretion. Courts of equity have enforced contracts which involved construction "from the earliest day to the present time." *Jones v. Parker*,

163 Mass. 564, 40 N.E. 1044 (1895) (Holmes, J.). The lease standards themselves permit judicial determination of any issue which might arise as a result of disagreement between the parties. Contrary to appellants' contention, the construction plans of stores in other centers used in the negotiation of the other department store leases no longer are needed, for the standards now exist in the leases themselves. The District Court correctly found that the leases "are integrated documents" and those construction drawings are "nowhere mentioned in the leases." (Supp. Memo., p. 39a.)

The Court's conclusion that specific performance should be ordered was not arbitrary, but rather was clearly required by concepts of fairness and integrity of contracts. The option and the lease are clear, certain, and provide the necessary "objective standard" for performance. Moreover, where the defendant "has enjoyed and received the benefits" of plaintiffs' performance, "the Court, from the plainest consideration of equity and common justice, does not regard with favor any objections raised by the defendant merely on the ground of the incompleteness or uncertainty of the agreement." *Morris v. Ballard*, 56 App. D. C. 383, 16 F.2d 175, 176 (1926).

III

Contrary to appellants' belated contention, new on this appeal, the help promised and given by appellee in return for the option violated no public policy. This help was to be in the nature of a professional opinion for use by appellants (not appellee) in the zoning proceeding — without the slightest inference that appellee was to, or did, use personal influence or private contacts with the zoning officials. It was appellants, not appellee, who were to obtain the rezoning needed before they could tender appellee a lease. Where, as here, what was promised and

done provided no invitation, temptation or tendency to induce improper action on appellee's part, and had "no sinister smack" whatsoever, no public policy is violated. *Valdes v. Larrinaga*, 233 U. S. 705 (1914).

Appellants' further contention as to the falsity of appellee's opinion letter was raised unsuccessfully by them below in another connection. Actually, top Lansburgh officials made a considered, expert choice in favor of the Lerner-Gudelsky tract, based upon earlier studies, and the letter accurately reflected what had been done.

IV

Specific performance here is not barred by laches. The District Court correctly found that "at all material times" since the promise was given, appellee had informed appellants of its intention to assert its right to a lease. (Opinion, p. 33a.) At no time did appellants ever state that they would not give appellee a lease, although on various occasions they both admitted and denied their obligation to do so. When, prior to the institution of this suit, appellee threatened litigation, appellants took the position that appellee's lease would have to await execution of leases with other department stores so that equality could be measured. (F. 1994.) Immediately after the execution of those leases, when appellants started steps to lease the one remaining department store site to another department store, appellee instituted this litigation.

V

Specific performance here is not barred by the Statute of Frauds. The District Court correctly found that the written assurance constituted a complete unilateral contract, fully stating the promise remaining to be performed, and its conditions, and signed by the parties to be

charged. Under the District of Columbia Code and numerous other authorities, it is well established that such a writing satisfies the Statute of Frauds and that the consideration may be established by parol evidence.

VI

Specific performance here is not barred by the limited rights of approval of plans for the third department store building by the Hecht Company and Woodward & Lothrop. The approvals may not unreasonably be withheld. They relate only to compliance of the third store with certain lease standards which it would have to meet in any event since those standards are common to all department store leases for the center. The stores were also on notice of appellee's claim prior to execution of their leases. Moreover, through their *force majeure* clauses, the leases provide an exception from the other lease requirements for any actions by appellants in accordance with judicial decree.

ARGUMENT

I. THE FINDINGS OF THE TRIAL COURT WERE NOT CLEARLY ERRONEOUS: ON THE CONTRARY, THE EVIDENCE CLEARLY SUPPORTS ITS FINDING THAT LANSBURGH'S WAS GIVEN A BINDING OPTION FOR A LEASE IN RETURN FOR ITS ASSISTANCE IN THE ZONING PROCEEDINGS

In their Statement of the Case and in Point I, appellants reargue the evidence at such length as to suggest *de novo* consideration. While we feel strongly that appellee would prevail on any such *de novo* consideration, we feel equally strongly that it is not the function of this Court to retry the case. *Bellevue Gardens, Inc. v. Hill*, 111 U. S. App. D. C. 343, 297 F.2d 185 (1961); *Hearst Radio, Inc. v. Good*, 67 U. S.

App. D. C. 250, 91 F.2d 555, 556 (1937). Thus, after briefly discussing the applicable standards of review, we shall review the evidence to the extent necessary in our view to show that the trial court's findings are not "clearly erroneous".[12] (F. R. Civ. P., 52(a))

A. This Court Is Not "Virtually Free" To Ignore The Trial Court's Findings.

Appellants, citing *Dollar v. Land*, 87 U. S. App. D. C. 214, 184 F.2d 245 (1950), *cert. denied*, 340 U. S. 884 (1950), assert that because of the procedure below, this Court is " 'virtually free' to ignore the trial judge's findings and substitute its own." This statement both ignores the clear meaning and intent of *Dollar v. Land*, and distorts what occurred below.

As noted earlier, Judge Gasch presided over all steps in this case below from the beginning. At the hearing on the preliminary injunction, appellee's principal witnesses, Mr. Jagels, Mrs. McKnight and Mr. Amsterdam, testified and were cross-examined before Judge Gasch on the critical factual issues in this case. Under F. R. Civ. P., 65(a) this testimony was introduced in evidence at the trial on the merits. At the trial, Messrs. Lerner and Ammerman, Mrs. Himmelfarb, who was Mr. Lerner's former secretary, and two other witnesses for appellants testified and were cross-examined on their contentions in open court.

Most of this testimony before Judge Gasch was directed squarely to the most important single issue in this case — was there a contract? Mr. Jagels, confirmed by Mrs. McKnight, expressly testified to circumstances clearly establishing a contractual relationship. (F. 1268-1269, 1931, 1216-1217.) Mr. Lerner, supported in part and contradicted in

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[12] We do not endeavor in this section to point out the many errors in appellants' statement and argument on the evidence. If this Court should wish to review any of the evidence more fully, we have analyzed a number of its aspects in greater detail in Appendix A to this brief.

part by Mrs. Himmelfarb, testified that the events were otherwise. The trial judge exercised his responsibility to choose between this conflicting testimony; his opinion shows that he believed appellee's witnesses and disbelieved appellants' witnesses. (Opinion, pp. 12a-15a.)

Under such circumstances, the proper scope of review is the "clearly erroneous" test specified in F. R. Civ. P., 52(a). In *Hearst Radio, Inc. v. Good*, 67 U. S. App. D. C. 250, 91 F.2d 555, 556 (1937) this Court stated:

> "The decision, as we think, turns wholly upon the single question, Was there a complete contract between the parties? . . . Witnesses were offered by both sides who testified to the course of negotiations between the parties. At best, the testimony is conflicting. . . . the findings of fact resolve this doubtful question against the plaintiff's contention. The purpose of a finding of fact is to settle for the appellate court the conflicts which are inevitable in litigation such as this. And it is a well-settled and salutary rule that a finding based on conflicting testimony will be overridden only in the clearest case."

The scope of review appropriate in *Dollar v. Land, supra*, clearly is inappropriate here.[13] This is clear both from that decision itself and its subsequent application by this Court. *E.g., Wynne v. Boone*, 88 U. S. App. D. C. 363, 191 F.2d 220 (1951). The fact that in addition to this important oral testimony there were a number of depositions and documents does not permit the appellate court to substitute its judgment for that of

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[13] It should be noted that even where the evidence is wholly documentary, the Supreme Court appears to have applied the "clearly erroneous" test. See Commissioner v. Duberstein, 363 U. S. 278 (1960), and cases discussed in Lundgren v. Freeman, 307 F.2d 104, 113-15 (9th Cir. 1962).

the trial court.[14] And surely the fact that some of the witnesses were heard by Judge Gasch on the hearing on the preliminary injunction and the others were heard at the full trial on the merits is immaterial.[15]

B. The "Clearly Erroneous" Test Is Applicable Even Assuming That The Evidence Before The Trial Court Must Be "Clear And Convincing."

In *Wynne v. Boone*, *supra*, this Court explicitly stated that Rule 52(a) is applicable even assuming that the proof in the District Court had to be by "clear and convincing evidence":

> "Our duty under the mandate of Rule 52(a) is to uphold the trial judge's findings of fact 'unless clearly erroneous'. That duty cannot be supplanted by the application of a rule requiring fraud to be shown by clear and convincing evidence, sound though such a rule is as a guide to the trial court or jury in deciding particular issues." (191 F.2d at 222.)

The fact that what the trial court did here was to grant specific performance in no way changes the scope of review. See *Steele v. McCargo*, 260 F.2d 753, 759 (8th Cir. 1958).

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[14] Remington Rand, Inc. v. Societe Internationale Pour Participations Industrielles et Commerciales S. A., etc., et al., 88 U. S. App. D. C. 275, 188 F.2d 1011, 1013, cert. denied, 342 U. S. 832 (1951); L. John Manufacturing Co. v. Phillips Television & Appliance, 96 U. S. App. D. C. 161, 223 F.2d 626 (1955). See also, Judge Learned Hand in U. S. v. Aluminum Co. of America, 148 F.2d 416, 433 (2d Cir. 1945) (insofar as trial court's findings depend on whether witnesses he heard spoke the truth "they must be treated as unassailable").

[15] Cf., United States v. National Asso. of Real Estate Boards, 339 U. S. 485, 488 (1950).

Furthermore, despite the dicta in *Cleborne v. Totten*,[16] the "clear and convincing" evidence requirement probably is not applicable in a specific performance case to anything other than the certainty of the terms of the performance to be decreed. This was the point of *Crowell v. Gould*,[17] cited by appellants, and of the statement by Professor Pomeroy quoted in their brief. See also, *Restatement, Contracts*, §370 (which relates solely to terms of the performance), and 5A *Corbin on Contracts*, §1174 (1964) (pointing out that even as to certainty of terms the degree of definiteness required "is seldom much greater than is required for enforcement of other remedies" (pp. 278-79)). Moreover, since appellants are trying to vary the meaning of otherwise clear documents by their parol evidence, any "clear and convincing" evidence burden must also be shared by them.[18]

C. The Evidence Clearly Supports The District Court's Findings.

1. An option for a lease was promised and given in return for Lansburgh's assistance.

The principal witness for appellee was Mr. Charles Jagels, highly respected as a top department store executive and for his civic activities. Prior to joining the City Stores organization in 1960, he had been associated with the R. H. Macy Company for some 26 years, serving as President and as Chairman of the Board of the Davis & Paxton Company, Macy's Atlanta Division, which operated seven department stores in the Georgia area. (F. 1265.) In the summer of 1960, he became President

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[16] 61 App. D. C. 69, 57 F.2d 435, 438 (1932). There the evidence "utterly fails" to show a contract. The quotation relied upon by appellants is in turn a quotation from a very early Supreme Court decision.

[17] 68 App. D. C. 297, 96 F.2d 569 (1938).

[18] See 3 Corbin on Contracts, §579 at 420 (1964).

of the Lansburgh's department store division, and was also elected as Vice President and a Director of City Stores Company.[19] (*Id.*) He left at his own request in 1965 to become President of the $12,000,000 Atlanta Memorial Cultural Center. (F. 1264, 1293.) He has no financial interest in this litigation. (F. 1244.)

The circumstances of the contract between City Stores and the Gudelsky-Lerner interests were simply stated by Mr. Jagels in his testimony in open court. He told of his existing business relationship with Messrs. Lerner and Gudelsky, of his knowledge of the competition between the Lerner-Gudelsky and Rouse groups for zoning at Tyson's Corner, and of his studies and conclusion that the Gudelsky-Lerner tract was preferable. He stated:

> "In discussing, general discussions we had with Mr. Lerner and Mr. Gudelsky, these questions were brought out, and in preparation for a meeting on the 31st of May of that year, I was requested — I was asked if I would write a letter to Lerner and Gudelsky expressing my opinion.
>
> "Q. Excuse me, who asked you that, Mr. Jagels?
>
> "A. Mr. Lerner.
>
> "To express my opinion as to the value of one piece of property against another for a shopping center and reasons for it.
>
> "I said, well, since we had already made this decision ourselves, that the Lerner Gudelsky property was the better of the two,

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[19] Mr. Jagels remained as President of Lansburgh's and as a Director of City Stores until January 1965, a year and one-half after the initial three-year term of his employment contract had run. (F. 1293.) While at Lansburgh's, Mr. Jagels also was first Chairman of the Retail Bureau of the Metropolitan Washington Board of Trade, and a Director of both the First National Bank of Washington and the National Symphony Orchestra. (F. 1264.)

I said I'd be very happy to provide such a letter providing that we could get something in return, and that something in return would be becoming one of the stores in this shopping center under terms no worse than any other major department store.

"To this, Mr. Lerner agreed. I also made the stipulation before I would provide this letter that I would like to have a letter from Lerner and Gudelsky expressing — giving us this assurance.

"Most of my associations, businesswise, had been with Mr. Lerner but I felt Mr. Gudelsky was the senior partner and at the time I asked for this letter I asked Mr. Lerner if he would have the signatures of both partners, both of these partners, to which he readily agreed." (F. 1268-1269.)

He then stated that he dictated Lansburgh's opinion letter, checked it with Mr. Lerner by telephone, and that this letter and the Lerner-Gudelsky written assurance then were exchanged (*Id.*).

Nothing in Mr. Jagels' prior or subsequent testimony varied substantially from the above simple story. Being an honest witness, he quickly conceded on cross-examination that he could not recall *in haec verba* the language he and Mr. Lerner had used in their 1962 discussions. He said there were several conversations in person and by telephone — and while he no longer could separate these conversations or report them word for word, "Mr. Lerner and I had an agreement, had a pact that my letter would be presented to him if and when I got the letter from him." (F. 1282; see also, F. 1216-1217.)

This was no assumption — it was a recollection consistent with his business experience, spoken with an emphasis and sincerity that obviously impressed the trial judge.

Mr. Jagels' testimony was confirmed by the testimony in open court of his former secretary, Mrs. Ora McKnight. She was no longer in Lansburgh's employ at the time she testified, and had no financial interest in this litigation. (F. 1928-1929.) She testified that she heard Mr. Jagels read the contents of the May 29 letter to Mr. Lerner over the phone and

> "at that time that he told him again that he wanted something in writing that would assure us, assure Lansburgh's that they would be one of the major stores in this center if it were zoned, and they had a development at Tyson's Corner." (F. 1931.)

This testimony was also confirmed by other key executives of Lansburgh's and City Stores. (F. 1129-1137, 1104-1105.)

The written assurance letter appellants concede was typed in Mr. Lerner's office. It was typed at Mr. Lerner's direction from a draft he gave to his secretary. Mr. Gudelsky was called in by radio phone, at apparently considerable inconvenience to him, to sign it. (F. 1718-1719, 1723, 1734, 1735.)

It seems clear from the record, and the District Court so found (Opinion, p. 14a), that the time of the exchange of Lansburgh's opinion letter and the Lerner-Gudelsky option letter was prior to the zoning proceeding on May 31 — contrary to appellants' contention that the latter document was not given until June 4, 1962.[20] Lerner personally

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[20] Lerner claimed this occurred on the morning of June 4, and that Mr. Jagels was present and brought the document which was retyped word for word to obtain extra copies which have since disappeared. (F. 1563-1564, 1644-1645, 1649-1650, 1386.) His secretary said that it was retyped from a marked-up draft, which is why the office duplicating machine was not used. (F. 1731-1735.) Jagels denied going out to Lerner's office for such purpose or supplying the document or a draft. (F. 1448.) The inconsistencies and contradictions in the testimony of Lerner and his former secretary (whom appellants incorrectly described as the "only" disinterested witness in the case) are analyzed in the Appendix, infra, at 6A-10A. The trial court clearly had the right to believe portions and reject other portions. E.g., Globe Indemnity Co. v. Richerson, 315 F.2d 3, 6 (5th Cir. 1963; Pandolfo v. Acheson, 202 F.2d 38, 41 (2d Cir. 1953).

picked up the Lansburgh's May 29 letter at Lansburgh's on that date.[21] Mr. Jagels was certain that he had the Lerner-Gudelsky option letter before May 31.[22] Conclusive on this point is that the option letter itself uses the phrase "*if* we are successful." Mr. Lerner conceded at the trial that based upon the Fairfax County Board of Supervisors' vote on May 31, he knew then that they were successful. (F. 1888-1889.)

In addition to appellee's testimony, many of the admissions, contradictions and inconsistencies in Mr. Lerner's testimony tend to support the trial court's findings on the existence of a binding contract. Since many important transactions among honorable businessmen are sealed by no more than a handshake, and since other business transactions of Messrs. Lerner and Gudelsky show a pattern of informality,[23] it does not discredit the transaction that it was sealed by a simple document. Furthermore, the option letter to Lansburgh's had the highly unusual feature of being signed by both Lerner and Gudelsky.[24] This is virtually conclusive evidence in itself that the document was deliberately intended to be both meaningful and binding upon the signatories.

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[21] See Mrs. McKnight's testimony. (F. 1930.) Mr. Lerner does not recall picking up the letter, but does not deny that he did so. (F. 1634, 1852, 1030, 1032.)

[22] F. 1217; see also, testimony of Mrs. McKnight. (F. 1931)

[23] They did not have a written partnership agreement relating to Tyson's Corner during Mr. Gudelsky's life, and no written agreement came into existence among the partners until 1965. (F. 2011-2012, 1985-1986.) Mr. Lerner at first testified that all his arrangements with the landowners at Tyson's Corner were oral and based on a handshake. As it developed, his recollection there also was faulty, but the binding document was a letter signed by both Messrs. Lerner and Gudelsky. (F. 1939, 1942-1943, 1537-1539, 1886-1887.)

[24] The only other documents in the record bearing both signatures are: (1) a letter committing Messrs. Lerner and Gudelsky to a lease of the Tyson's Corner land, and (2) a letter to their zoning counsel for formal submission to the Fairfax County authorities. (F. 1886-1887, 514-515, 1653-1656, 2127.)

2. It was reasonable that an option for a lease was exchanged for Lansburgh's assistance in the zoning proceedings.

As we noted earlier, the fact that Tyson's Corner has moved forward with major department store leases and a permanent financing agreement — both of which took cognizance of Lansburgh's option rights — establishes that the existence of an option such as this is not a barrier to the success of the center.

Furthermore, at the time of the 1962 transaction, Messrs. Lerner and Gudelsky desired Lansburgh's as a tenant in the shopping centers they controlled.[25] To give an option for a lease to a desired tenant for valuable consideration is certainly not out of keeping with reasonable business practice.

Moreover, contrary to appellants' suggestion, that option was not worth fifty million dollars to anyone at the time — in fact, it was almost valueless, for it was conditioned, as it had to be, on Messrs. Lerner and Gudelsky succeeding in securing reversal of the earlier adverse Fairfax County zoning proceedings.

When the Fairfax zoning officials initially rejected shopping center zoning of the Lerner-Gudelsky tract, they recommended it for motel and convention hall use. As such, however, appellants felt the land would be "worthless." (F. 1829-1830, 2169-2170.) Lerner admitted that the expenditures and efforts theretofore made in the zoning

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[25] Mr. Lerner so admitted. (F. 1863, 1012-1014, 1017-1018, 1020, 1041.) In the fall of 1962 lease terms for a Lansburgh's store at Wheaton Plaza were negotiated. (F. 2059; see F. 2063-2095.) Oxon Hill (their third center) is still not underway almost five years later and appellants sought to interest Lansburgh's therein. (F. 1940-1941, 1019, 373.) Lansburgh's, Washington's oldest department store, has two suburban branches, and is part of a large retail chain which has a Triple A credit rating. (F. 1297.)

proceeding "would have gone down the drain" unless shopping center zoning was granted (F. 1840-1841), and that this was their "one chance" (F. 1842).[26]

What made the option valuable was that shortly after it was given, Messrs. Lerner and Gudelsky were successful in the zoning proceedings. In helping achieve that success, they utilized the very appropriate consideration they had obtained from Lansburgh's in return for the option. The usefulness of the preference for appellants' tract expressed in the Lansburgh's opinion letter is clearly demonstrated by the zoning record.[27]

In the course of his presentation, Mr. Rouse, an expert shopping center developer (F. 1636), referred to the letters he had solicited and received from Woodward & Lothrop and the Hecht Company.[28] When asked by a Board member whether either of the stores had indicated a preference for his site, Mr. Rouse answered in the negative and added: "*Obviously if I'd been able to get them to state that publicly I would have had them here saying it.*" (Emphasis added.) (F. 1637, 2191-2193.)

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[26] See also, statement by their counsel before the County Board of Supervisors as to the very tenuous nature of the Lerner-Gudelsky hopes and expectations. (F. 2167-2168.)

[27] The record in the Fairfax County proceedings is replete with statements showing that the shopping center will be built around the major department store tenants. (See, e.g., F.2181-2182, 2184-2185, 2187, 2189-2190, 2214-2216, 2218.) The Lansburgh's letter was concededly the only letter from a major department store tenant which expressed a preference as between the two competing sites. (F. 1848.)

[28] F. 1636, 2191; the letters received by Mr. Rouse are F.333-334.

Later, a Board member asked counsel for Lerner-Gudelsky a similar question, and he responded by presenting a copy of the Lansburgh's letter to each Board member, reading the entire letter into the record, and stating that the letter "very emphatically" shows that Lansburgh's "found the tract to be the best and they will locate only on that tract."[29]

Clearly, the Lansburgh's letter was of affirmative help in that proceeding.

3. The written assurance was an option for a lease.

Appellants seek to vary the plain meaning of the written assurance given by Messrs. Lerner and Gudelsky. Mr. Lerner at different times ascribed a number of different meanings to the document (none of which appear therein), such as that he was giving Lansburgh's the "opportunity to negotiate" or the "opportunity to be considered" or the "opportunity to compete for a place in the center."[30] (F. 1568, 1044-1045.)

But, at the trial, when pressed on cross-examination, Lerner was forced to concede that on their face "there is a difference" between his claimed meanings and the assured "opportunity to become a tenant at rental and terms at least equal to that of any other major department store in the center." (F. 1657-1660.)

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[29] He concluded, after reading the letter, "That, I think, is in answer to what Mr. Rouse said . . . ." (F. 1639-1641, 2195-2196.), referring to Rouse's earlier statement that he could "persuade the major department stores of the superiority of [his] site. . . ." (F. 1638-1639, 2194.)

[30] For example, whether Lansburgh's would obtain a lease, Lerner testified, would be in the "good judgment" of Messrs. Lerner and Gudelsky, if they "saw fit." Lerner conceded that such phrases as "in our good judgment" or "if we saw fit" were not in the written assurance and that he did not seek to put them in. (F. 1044-1045.)

Appellants' brief also undertakes an elaborate dissertation to show that the "assurance that one will be given an opportunity" (to become a tenant) is not an "option to lease." (See pages 37-39.) This argument is based primarily upon dictionary definitions of words taken out of context.[31]

Appellants consistently have refused to read the document as a whole. Even if their dictionary approach to contract interpretation were to be adopted,[32] it must be in the context of the document.

The language quoted by appellants where appellee or their counsel have used the word "opportunity" without meaning "option" is not relevant here. "Option" is a description of the legal effect of the entire document signed by Messrs. Lerner and Gudelsky, of all the words in context. The instances they cite do not involve any kind of assurance

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[31] Their lack of pertinence is characterized by appellants' observation that:

> "The word 'option' is derived from the Latin root 'optare', meaning to choose . . . . By contrast, the word 'opportunity', is derived from the Latin word 'opportunus', literally 'made of ob and portus, at or before the harbor, [it] suggests the timely arrival of one's ship . . . .'"

If one may find any relevance in this statement, it is that in the present case the Gudelsky-Lerner letter assured appellee that its ship would come in if appellants were successful in the zoning proceeding. Appellants' quotations from dictionaries are not persuasive. Appellants cite the new Random House Dictionary definition of "opportunity", the first of which, as quoted by them, is:

> "an appropriate or favorable time or occasion."

But surely compliance with the promised "appropriate occasion to become a tenant" is not obtained by refusing to offer appellee a lease and endeavoring to lease the one remaining department store site in the center to Sears.

[32] See 1A, Corbin on Contracts (1963 ed.), §261 at 484, n. 23: interpretation of a contract ". . . cannot be done by merely studying a number of the best dictionaries."

whatsoever, and thus could not be binding. Whenever an "opportunity" has been "assured" in a similar contractual context the courts have had no hesitancy in finding a specifically enforceable option.[33]

The fact is that there is nothing ambiguous about the Lerner-Gudelsky letter. The Lerner-Gudelsky letter, on its face, will not support such constructions. Parol evidence intended to substitute a different interpretation for the written document, if admissible at all, must be clear and convincing.[34] The District Court properly was not convinced.

II. THE OPTION AND THE LEASE ARE CERTAIN AND SPECIFICALLY ENFORCEABLE

Appellants, in Point II of their brief, argue that as a matter of law the option is too indefinite to be more than an agreement in principle and, therefore, is not binding, and in any event the lease attached to the court's Order is not "equal." In Point V they argue that the lease is too indefinite to be specifically enforceable. Since the District

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[33] E.g., Lovick v. Provident Life Ass'n., 110 N. C. 93, 14 S.E. 506 (1892); (held: plaintiff entitled to be reinstated under a life insurance policy clause providing that one whose policy has been cancelled for non-payment of premiums should have the ". . . opportunity for reinstatement" on "similar conditions" to those in the defunct policy, "opportunity" here meaning "right"; (emphasis added)); Lowell v. First Church of Christ, Scientist, 143 A.2d 671, 101 N. H. 363 (1958) ("an opportunity to purchase at the same price that is offered by a bona fide offer" specifically enforced); Barling v. Horn, 296 S.W. 2d 94 (S. Ct. Mo. 1956); ("first opportunity to purchase premises before expiration of this term" held to be an option to buy on terms offered to others). Moreover, when the context demonstrates a contractual agreement, the courts have frequently held that an "assurance" is synonymous to a promise, pledge or guarantee. E.g., Texas and N.O.R.R. Co. v. New, 95 S.W. 2d 170, 175; National Watch Co. v. Weiss, 163 N.Y.S. 46, 47, 98 N. Y. Misc. 453; Van Hooh v. Southern Calif. Waiters Alliance, 158 Calif. App. 2d 556, 323 P.2d 212, 220.

[34] 3 Corbin on Contracts, §579 at p. 420, et seq.

Court correctly found as a matter of fact, as we discussed in Point I, *supra*, that a binding option arrangement was intended, and since an otherwise valid option which is sufficiently definite to be specifically enforceable clearly is legally binding, we shall respond to both these points in this section.

In the option appellee was promised a lease "with rental and terms at least equal to that of any other major department store in the center." In ordering appellants to execute a lease of approximately 300 pages (F., Vol I) (which already had been executed by appellee, F. 169, 170, 254, 255, 290-291), the trial Court stated:

> ". . . The defendants would prefer the Court to order instead that they merely *negotiate* the terms of a lease with the plaintiff. However, as the Court's Opinion made clear, the defendants contracted with plaintiff for a lease, and the Court will Order specific performance of that contract. The terms of a lease are clearly ascertainable from material of record, and most specifically, from the terms of the Hecht and Woodward & Lothrop leases which defendants have already entered into. The lease to be attached to the Order is, in fact, a copy of those leases with such minor modifications as are necessary to adapt the document to plaintiff and to the third department store site in the Center. . . ." (Supp. Memo., p. 38a.)

The option provides an express standard to measure performance — equality with the leases given the other major department store tenants. Those very detailed leases clearly provide an exact standard to measure and define equality. The courts have long recognized that "when there was a contract at law, if there was an objective standard, capable of determination and application by experts, there might be specific performance." Pound, *The Progress of the Law, 1918-1919, Equity*, 33 Harv. L. Rev. 420, 434 (1920), citing *Jones v. Parker*, 163 Mass. 564, 40 N.E. 1044 (1895).

We shall touch briefly upon the applicable law, which is discussed extensively in the District Court's Opinion. We then will discuss the few details in which appellants claim either a lack of certainty or that the ordered lease is not equal to the Hecht lease.

A. Where The Promise To Be Enforced Provides A Clear Measure Of The Performance To Be Ordered, And The Consideration For That Promise Has Been Performed, Courts Will Enforce The Promise Except In The Most Compelling Circumstances.

The critical question here is whether the promise is sufficiently definite to permit specific enforcement, the only remedy available to appellee.[35] If it is, *a fortiori*, it is sufficiently definite to uphold the District Court's conclusion that it was not illusory, or as appellants claim, only an agreement in principle and not binding.

While not essential to its conclusion,[36] the District Court properly recognized the distinction between (1) the situation of preliminary negotiations, where part performance has not occurred — where the matters left for future agreement are such that it appears no contract

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[35] Because the full measure of appellee's damages are incalculable (Opinion, pp. 22a-23a; F. 1936-1938), and in order to obtain a more speedy trial in view of the state of the jury calendar and the record already made in this case, appellee stipulated dismissal of its claim for damages. In view of the nature of the consideration, restitution of course is not possible.

[36] The court's conclusion in Part II of its Opinion that the option is "sufficiently definite to be the subject of a decree for specific performance" (Opinion, p. 23a) would seem to subsume the lesser question considered in Part I of the Opinion whether the terms are sufficiently definite to constitute a valid contract.

was intended or reached; and (2) the situation where consideration was given for the promise, and thus a binding contract was intended, regardless of whether it is certain enough to be specifically enforceable. (Opinion, pp. 18a-19a.)[37] In the latter situation, as this Court has stated in *Morris v. Ballard*, 56 App. D. C. 383, 16 F.2d 175 (1926), quoting Pomeroy, *Specific Performance*, §145:

> "'When a *contract has been partly performed by* the plaintiff, and the defendant has received and enjoys the benefits thereof, and the plaintiff would be virtually remediless unless the contract were enforced, the court, from the plainest considerations of equity and common justice, does not regard with favor any objections raised by the defendant merely on the ground of the incompleteness or uncertainty of the agreement.'" 56 App. D. C. at 384, 16 F.2d at 176. (Emphasis in original.)

While this case falls within that rule, appellants' promise is sufficiently explicit to be specifically enforceable in any event. The vice of appellants' argument is the failure to recognize that so long as there was an otherwise binding option, and that option explicitly or implicitly provided an adequate standard to measure compliance with it, appellants cannot defeat their own obligation by refusing to tender or negotiate a lease complying with that standard. That is precisely what *Morris v. Ballard, supra*, held. In *Moon Motor Car Co. of N. Y. v. Moon Motor Car, Inc.*, 29 F.2d 3, 4 (2d Cir. 1928), Judge Learned Hand stated for the court

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[37] See, e.g., 1 Corbin on Contracts, §95, at pp. 400-402 (1963); Restatement; Contracts, §33, Atwater v. United States, 262 U. S. 495 (1923); Purvis v. United States ex rel. Associated Sand & Gravel Co., 344 F.2d 867 (9th Cir. 1965); Phillips Petroleum Co. v. Rau Const. Co., 130 F.2d 499 (8th Cir. 1942); Hunter v. Sparling, 87 Calif. App. 2d 711, 197 P.2d 807 (1948); Bohman v. Berg, 356 P.2d 185.

> "There is no objection to a promise that it is indefinite so long as the parties can tell when it has been performed, and it is enough if, when the time arrives, there shall be in existence some standard by which that can be tested."

Where an otherwise binding agreement has been made, and there is an ascertainable standard of performance, and a party has refused to comply with that standard by means of the further agreements required or otherwise, the courts have had no hesitancy in decreeing specific performance.[38]

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[38] E.g., Barnes v. Sind, 223 F. Supp. 572 (D. Md. 1963), rev'd on other grounds, 341 F.2d 676 (4th Cir.) (the Court of Appeals accepting the reasoning of the lower court), petition for rehearing en banc denied, 347 F.2d 324, cert. denied, 382 U. S. 891 (1965) (to supply "a substantially equivalent house"); Phillips Petroleum Co. v. Buster, 241 F.2d 178, 183 (10th Cir.), cert. denied, 355 U. S. 816 (1957) (to supply at reasonable prices amounts of gas reasonably necessary for operation of well); Williams v. Cow Gulch Oil Co., 270 Fed. 9 (8th Cir. 1921) (conveyance of 640 acres to be selected from much larger tract and to be of "average value"); Daniel v. Kensington Homes, Inc., 232 Md. 1, 192 A.2d 114 (1963) (property to be laid out and developed in accordance with F.H.A., V.A., Montgomery County and other regulations); Fletcher v. James Drug Stores, 1 N. J. Super. 138, 62 A.2d 383 (1948) (services identical to that rendered all other members of co-operative); Armstrong v. Southern Productions Co., 182 F.2d 238 (5th Cir. 1950) ("agreed estimated cost"); Air Technology Corp. v. General Electric Co., 347 Mass. 613, 199 N.E. 2d 538 (1964) (business opportunity to obtain reasonably profitable subcontract).

The District Court's Opinion cites and discusses numerous additional authorities. As the commentators make clear:

> "It seems probable that the difficulty regarding uncertainty has been overemphasized. It should not be allowed to hamper equitable relief further than necessity requires." 5 Williston on Contracts, §1424, p. 3989 (Rev. Ed., 1937).

See also, 1 Williston on Contracts, §§47, 48 (Jaeger 3rd Ed.); 5A Corbin on Contracts, §1174 (1964); Restatement, Contracts, §370, Comment d (1932).

Here we have an explicit standard — equality — and a most detailed lease with Hecht's to define that equality.[39] Decisions such as *Hazeltine*[40] and *Barling*[41] leave no question that reference to the Hecht lease is proper, and, in fact, appellants do not contend otherwise. That lease can be taken over virtually verbatim, except for changes of name, location of store (which clearly is established) and a few details discussed in the following section. (Supp. Memo., p. 38a.)

Courts historically and unhesitatingly have measured equality in many different situations, some far more abstruse than here is involved.[42] Appellants' contention that "the standard of 'equality' to

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[39] The appellants frequently use a similar, but somewhat less precise, standard in their own business dealings. Thus, the letter of intent signed with Hecht's and Woodward & Lothrop provided that their respective leases "shall be as similar as possible . . ." (F. 2101). In a letter to Woodward & Lothrop, Mr. Lerner agreed that the leases on said department store buildings "will be substantially the same" (F. 2109). In a letter to Hecht's, Mr. Lerner commented that the Hecht's and Woodward & Lothrop leases were "substantially the same in terms" (F. 2111); the leases with the other two department stores contain a provision that the lease for the third store shall not contain provisions more favorable to the occupant thereunder than are contained in the existing leases (F. 1903-1904); and Mr. Lerner admitted that the standard of equality is measurable. (F. 1904-1905.) In a letter to Sears, Mr. Lerner "proposed" a Sears lease "similar in all respects with the May Company's lease and with the Woodward & Lothrop lease . . . except as tailored to fit your particular location, the preparation of exhibits pertinent to your store and the excepting of certain clauses which you do not need in your lease." (F. 2057.) That is a precise description of the lease attached to the lower court's order, in conformity with its opinion. (Supp. Memo., p. 38a.)

[40] Hazeltine Corp. v. Zenith Radio Corp., 100 F.2d 10 (7th Cir. 1938), cert. denied, 306 U. S. 656 (1939).

[41] Barling v. Horn, 296 S.W. 2d 94 (S. Ct. Mo. 1956).

[42] E.g., Barnes v. Sind, supra, ("substantially equivalent house"); Graver Tank Co. v. Linde Air Prod. Co., 339 U. S. 605 (1950) ("equivalence" in patent infringement litigation); Shoemaker v. American Security & Trust Co., 82 U. S. App. D. C. 270, 163 F.2d 585 (1947) ("equitable approximation" to enforce a trust); In re Standard Gas & Electric Co., 59 F. Supp. 274 (D. Del. 1945) ("equitable equivalent of the right surrendered" in corporate reorganization); Wirtz v. Dennison Mfg. Co., 265 F. Supp. 787 (D. Mass. 1967) ("equal pay for equal work"); 2 McBride & Wachtell, Government Contracts, §10.180 (collecting cases on "brand name or equal"); Japan Import Co. v. United States, 86 F.2d 124, 131-32 (C.C.P.A. 1936) ("like or similar products" for customs duty purposes).

the Hecht lease has no such specific content" (Brief, p. 48) is wrong both as a matter of law and as a matter of fact. Their statement that:

> "Had the order used the word 'identical' rather than 'equal' the obligations imposed would have been sufficiently explicit" (*Id.*)

concedes the correctness of over 99 percent of the ordered lease terms, which are identical to the Hecht lease. Their statement that had the order used the words "substantially identical" an explicit standard would exist, concedes the remaining 1 percent.[43]

The two principal cases cited by appellants are not in conflict with specific enforcement of the option and lease. In *Reno Club v. Young Investment Co.*, 64 Nev. 312, 182 P.2d 1011 (1948), notwithstanding the language quoted by appellants, the court specifically enforced a lease option, stating that it would imply the "usual, ordinary covenants and provisions of leases," and, in fact, reading into the option the terms of a prior lease, thereby obviating the need for further negotiations. In *Lahaina-Maui Corp. v. Tau Tet Hew*, 362 F.2d 419 (9th Cir. 1966), not only were further agreements specifically contemplated but, in the absence of such agreements, no standard was

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[43] Moreover, minor uncertainties will not be permitted to defeat a contract. Purvis v. United States ex rel. Associated Sand & Gravel Co., 344 F.2d 867, 869-870 (9th Cir. 1965).

available to measure what the court considered a vital portion of the performance. Thus, specific performance was denied.[44]

B. The District Court's Determination That The Lease Ordered Was Equal To The Hecht Lease Is Not Clearly Erroneous, Its Exercise Of Discretion In Ordering Specific Performance Was Not Arbitrary, And The Lease Ordered Specifically Performed Is Most Clear And Certain.

The remedy of specific performance is discretionary with the trial court. *Crowell v. Gould, supra.* The District Court's exercise of discretion was not "arbitrary, fanciful, or clearly unreasonable"[45]

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[44] We will not comment on all of the other cases cited by appellants, since they basically divide into three categories illustrated by the three cases they chiefly rely upon: (1) mere negotiations where clearly no contract ever was reached: e.g., Cleborne v. Totten, 61 App. D. C. 69, 57 F.2d 435 (1932); (2) cases where the language used and circumstances indicated that only preliminary negotiations were involved, and also provide no standards of performance or standards which the court considered too vague: e.g., Saxon Theater Corp. v. Sage, 347 Mass. 662, 200 N.E. 2d 241 (1964) (document expressed "mutual intent," did not provide rent for last 10 years of lease, plans and specifications "to be mutually agreed upon," location of structure and boundaries of land uncertain, exact identity of lessor and lessee unsettled); and (3) cases where although a contract was intended, the standards, either express or implied, were not sufficient to define significant aspects of the performance: e.g., Besinger v. National Tea Company, 75 Ill. App. 2d 395, 221 N.E. 2d 156, 157-158 (1966) (district court denied specific performance because of supervision requirements. Affirmed primarily on grounds of uncertainty because no specification of design of building, including dimensions, nature and quality of construction materials, heating, lighting, plumbing, nature and number of the outbuildings and other structures necessary and suitable for the conduct of lessee's business, number and location of the service areas and driveways to be built).

[45] United States v. McWilliams, 82 U. S. App. D. C. 259, 163 F.2d 695 (1947) and cases there collected.

and, thus, should not be disturbed on appeal. The trial judge, who heard the case from its inception, gave most careful consideration to the order to be issued as he detailed in his Supplemental Memorandum (pp. 36a-37a). He concluded, as his Opinion also makes clear, that an equal lease could be ordered (pp. 32a, 38a-39a), and that court supervision, if any proves required, would not be too burdensome (pp. 31a-32a).[46] He ordered a very specific equal lease (F., Vol. I), and his determination of equality, basically a factual one, was not "clearly erroneous."[47]

The ordered lease, which appellants cannot and do not dispute, is virtually identical with the Hecht lease, contains approximately 200 pages, including two amendments, plus approximately 100 pages of exhibits. Their claims in Points II and V of their brief boil down to five items. Of these, three relate to alleged inequality (one of which they also claim as posing impossibility) presenting factual issues disposed of by the trial court. These points are clearly without merit considered either individually or in the context of whether the entire ordered lease is equal to the Hecht lease. The remaining two items, one of uncertainty, and one relating to subsequent court supervision, also are individually meritless and, in any event, well within the proper exercise of discretion by the District Court.

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[46] All aspects of the lease which might remotely require supervision will be concluded in approximately a year's time, and the court may refer any matter which arises to a special master, having retained jurisdiction to issue such further orders as may be necessary.

[47] In Barnes v. Sind, supra, the determination of what constituted an equal house was considered a factual one. In Graver Tank Co. v. Linde Air Prod. Co., supra, the "clearly erroneous" test was held applicable to a finding of "equivalence."

Inequality

(1) Prior to the negotiation of the Hecht's and Woodward & Lothrop leases, those stores made available to appellants detailed construction drawings of their stores at another shopping center to indicate the kind of stores they desired. These plans were used as a basis for negotiating Exhibits D to the leases (F. 1796) — the detailed construction specifications, a document already incorporated in the ordered lease (F. 180-201). Appellants complain that since appellee has not furnished such plans, appellants are being treated unequally, and that they will be compelled to furnish such drawings. This is absurd since no negotiation of Exhibit D is required.

The District Court disposed of this same point as follows:

> ". . . Those leases are integrated documents, and hence defendants' argument that they were conditioned on the pre-lease provision by the tenants of detailed construction drawings of other store buildings which were to serve as models for the Tyson's Corner stores — construction drawings nowhere mentioned in the leases themselves — is not persuasive. The Court instead is convinced that to the extent such drawings were made available, it was simply for the advantage of the tenants, who wished to have their stores at Tyson's Corner resemble those at the Landmark shopping center. Plaintiff makes no such demand. . . ." (Supp. Memo., pp. 39a-40a.)[48]

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[48] The Hecht's and Woodward & Lothrop leases, which make no reference to these construction drawings of other stores (F. 1788; Supp. Memo., p. 39a), provide:

> ". . . No representation, inducement, understanding or anything of any nature whatsoever made or represented on Landlord's behalf or on Tenant's behalf, either orally or in writing (except this Lease) has induced the other party to enter into this Lease." (P. 135 of both leases, quoted at F. 160.)

Appellants' architect admitted that the discussions with the stores over such matters were for the store's convenience. (F. 1813-1815.) Mr. Lerner conceded that "the preliminary drawings of the building are normally made after the lease has been executed . . ." (F. 1892.)

Since these construction drawings appellants refer to are in no way referenced in the Hecht or Woodward & Lothrop leases, and since, on the contrary, Exhibit D to the Hecht lease is incorporated in the ordered lease virtually verbatim, it is absurd to suggest that the execution of a lease word for word identical with the Hecht lease in this respect is not equal because appellants were not previously furnished a type of drawing nowhere even referenced in the lease.

(2) Appellants, under the guise that they are being treated unequally, now urge that the lease should not be equal to the Hecht lease. They state their estimated cost of the Woodward & Lothrop building is $15 a square foot and their estimated cost of the Hecht building is $13 a square foot, and that this difference was because Woodward & Lothrop had a higher price image than Hecht's. They thereupon suggest that Lansburgh's should be given a lower cost building than Hecht's because they allege it has a lower price image than Hecht's.

Apart from the fact that Mr. Lerner testified that he would expect a Lansburgh's store to cost approximately $13 a square foot (F. 1913), under the terms of the option agreement[49] Lansburgh's was entitled to the lease equal to the most favorable lease given — thus, of a store which was as costly as the Woodward & Lothrop store. Appellee stated below that it was willing to accept a store equal to the Hecht's store (F. 1684), thereby saving appellants some $2 per square foot. That is what the Court ordered. To now suggest that appellee be treated even unequal to the Hecht Company thus comes with no merit, and bad grace.

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49 " . . . at rental and terms at least equal to that of <u>any other</u> major department store . . . ."

It should be noted that appellants also argue, somewhat inconsistently, that cost of the building is not mentioned in the May and Woodward leases, and that they are required to build buildings of "particular designs," not of "particular costs." That, of course, is also true of the lease with appellee. The store is to be the same size and shape as the Hecht store, comply with the same Exhibit D and other specifications and lease requirements, and as discussed below, have a functionally and aesthetically equal exterior design. What the Court has done is point out that if even within those precise standards, a dispute arises between the parties, the court will also use equality of cost as a further measure of equality since appellants claim it formed the basis of their negotiations with the other stores.

(3) While all the department stores have a below ground level on several sides, the topography permits an outside entrance at one side of the lower level of the Hecht's store, and on two sides of the lower level of the Woodward & Lothrop store (F., Vol. I, Exhibit B). Appellee also desired this split-level effect, but appellants claimed it was not feasible. Appellee thereupon agreed to waive this right, and take a less desirable store, namely, with the lower level of appellee's store having no outside entrances. (F. 1927.)

In their brief, appellants assert that "no provision is made for the design, construction and excavation problems created by this requirement." (Brief, p. 52.) Of course, none of the leases tell appellants the mechanics of how to build the stores, as distinguished from the standards the buildings shall meet.[50] With respect to such standards, appellants below alleged difficulties in connection with "state

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50 "If one contracts to produce a definite result, he is nonetheless bound because the means of producing that result are left to his discretion." 1 Corbin on Contracts, p. 452 (1963).

and county regulations relating to fire escapes, heating, ventilation and sanitation." (F. 2136-2137, 2019; see also, F. 519-522, 2139-2140.)[51] Admitting that all these matters are covered by "standards" set in Exhibit D, the construction specifications (F. 2137), appellants argued below and now that Exhibit D may not be used with such a lower level without substantial changes, and that compliance with Exhibit D is impossible (*Id.*; appellants' brief, p. 52). Although one witness so testified without specifying why this was true (while also testifying he was not competent to design or make the drawings of a department store) (F. 1812-1814), two witnesses, Mr. Lerner and one of his architects, both explicitly admitted that Exhibit D could be used in toto if the *outside entrance* to the lower level, *not* the lower level, were eliminated. (F. 1892-1899, 1685-1686, 1799-1800.)[52] The Court accepted that testimony, which clearly is consistent with Exhibit D to the lease.[53]

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[51] Thus, this very issue was the subject of testimony at two separate hearings, one memorandum filed by appellee, one memorandum filed by appellants and two letters to the court written by appellants.

[52] They also required, because of the site, that the axis on which the store connected to the mall be the long axis, not the short axis (F. 1914), which was put into Exhibit D and is not here in controversy.

[53] The provisions of Exhibit D, relating to virtually all aspects of the construction, are equally applicable and equally specific to a fully excavated lower level, including provisions as to the type of flooring required (see Exhibit D to lease, p. 9, ¶3(b)(2), F. 188) and the kind of waterproofing for underground exterior walls (p. 9, ¶3(b)(8), F. 189). There are requirements for fire stairs and fire exits, air conditioning and related items (F. 190, 195, et seq.) which were the items urged as insuperable barriers on this same point by appellants in the court below and rejected. (F. 519-522.)

Uncertainty

(4) The only point on uncertainty which appellants raise on its face demonstrates it is without merit. This point relates to Exhibit J of the lease, which is the exhibit showing a schematic drawing of the exterior facade of the store to be leased to appellee.

It cannot be disputed that the size of the store, the shape of the store, and the construction standards the store must meet, all are specifically determined by the lease (F. 48-49, 180-201). Appellants were forced to admit that the schematic drawing of the Hecht's store was not attached to the lease at the time of its execution (F. 1902), and that under the Woodward & Lothrop lease appellants were to prepare that schematic drawing subject to mutual agreement of the parties (F. 2126).

The ordered lease not only is more definite than the Hecht's and Woodward & Lothrop leases in this regard but, because appellants objected to their providing such schematic drawings (Supp. Memo., p. 38a), the lease also states that they are to be provided by appellee within 30 days, with appellants having 15 additional days to register specific objections if the drawings do not comply with the applicable standards (F., Vol. I, Exhibit J). The standards the drawings are to meet are very specific and certainly unobjectionable, as follows:

> "Each of said exterior designs shall comply with the requirements of Sections VIII and IX and Exhibits B and D to the lease, shall harmonize in design concept, quality of construction and materials, decor, color, and treatment, with the overall design of the shopping center, and shall be functionally and aesthetically equal to the exterior designs set forth in 'Exhibit J' and 'Exhibit J Proposed Tire Center,' respectively. Tenant's Principal Building shall have the same

> height measured from the Mall Level as shown on Exhibit J for the May Store (43 feet). Each of said exterior designs shall include the name Lansburgh's as set forth in the drawing labelled 'Lansburgh's Sign - Exhibit J' appropriately displayed on each elevation in a manner comparable to The Hecht Company name on 'Exhibit J,' and 'Exhibit J Proposed Tire Center,' respectively. The Tenant TBA shall also contain after the name 'Lansburgh's' the words 'Tire Center' in compatible lettering, and the Tenant Auxiliary Installation shall also contain after the name 'Lansburgh's' the words 'Garden Center' in compatible lettering." (F., Vol. I, Exhibit J.)

These are not novel requirements. Comparable and even less specific provisions are contained in the Hecht's and Woodward & Lothrop leases.[54] Obviously, appellants considered those provisions quite clear and understandable, as did the two other department stores, and the fact that they relate to the Mall Stores, rather than the department stores, hardly bears on their certainty.

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54 "(B) The Additional Mall Stores shall conform in design concept, quality of construction, standards and materials, decor, color and treatment to the Mall Stores, as originally constructed." (Article XXXIX, Section 39.2(B), F. 2125.)

* * *

"(G) The quality of (i) the construction, (ii) the construction components, (iii) the decorative elements (including landscaping and irrigation systems for the landscaping) and (iv) the furnishings; and the general architectural character and general design, the materials selection, the decor and the treatment values, approach and standards of the Enclosed Mall shall be comparable, at minimum, to the qualities, values, approaches and standards as of the date hereof of the enclosed Mall at Topanga Plaza Shopping Center, Los Angeles, California. . . ." (Article VIII, Section 8.2(G), F. 2120.)

This one item is virtually the whole of appellants' argument about uncertainty and requirements of further negotiation, taking up two sections of appellants' brief. Appellants go through with this much ado about nothing, not on the basis of specific problems, but by quoting the statement of the District Court in its original Opinion that

> " . . . But some details of design, construction and price of the building to be occupied by plaintiff at Tyson's Corner would have to be agreed to by the parties, subject to further negotiation and tempered only by the promise of equal terms with other tenants. . . ."[55]
> (Opinion, p. 23a.)

Appellants overlook the fact that, as appellee requested of appellants long before this litigation, compliance with the option obviously could have been obtained through negotiation or by tendering appellee an equal lease. What is important, however, is that since they refused to do so, precise compliance also may be obtained through Court order, which is what appellee sought when appellants would not tender a lease to appellee. Appellee thus proposed that all matters could be resolved with precision by applying the standard of equality to the Hecht lease and ordering a lease identical in all respects possible, and equal in the few instances where identity was not possible. This was done, and as the District Court stated in its Supplemental Opinion:

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[55] The District Court, in its Opinion, also stated that appellee had conceded that there were "numerous complex details left to be worked out." (Opinion, p. 23a.) This was true at that time in the sense that they had to be determined by application of the equality standard to the Hecht's lease. This step was accomplished by the District Court's Order, as stated in its Supplemental Memorandum, and leaves no such "complex details" remaining.

> "In summary, after hearing and reading extensive arguments from both parties, the Court is convinced that the minor negotiations that yet remain can be conducted easily within the confines of a lease, and that the defendants' leases with The Hecht Company and Woodward & Lothrop contain the identical negotiation problems and provisions as that proposed for plaintiff." [56] (Supp. Memo., p. 39a; see *Id.*, 40a.)

Court Supervision

(5) Appellants parade horrors of how at one point or another they may not know if the provisions of the lease are satisfied, and no provision is made for judicial supervision. But Exhibit J provides a precise procedure for incorporation of the schematic drawing there involved into the lease. (F., Vol. I, Exhibit J.) The Exhibit D construction specifications provide precise substantive and procedural requirements concerning the store building, as does Article X of the lease. (F. 180-206; 54-63.)

The same imagined problems can arise under the Hecht and Woodward leases, but here, appellants have further protection if need be. The Court provided in its Order:

> "Jurisdiction is retained for the purpose of enabling any of the parties to apply to the Court for such further orders and directions as may

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[56] The court previously also had stated:

> " . . . Although the exact design of plaintiff's store will not be identical to the design of any other store, it must be remembered that all of the stores are to be part of the same center and subject to its overall design requirements. If the parties are not in good faith able to reach an agreement on certain details, the court will appoint a special master to help settle their differences. . . ." (Opinion, p. 32a.)

> be necessary or appropriate for the carrying out of this Order and for the enforcement of compliance therewith." (F. 2.)

Of course, the Court and the appellants would hope that good faith compliance would obviate the need for further supervision, but it is available, including the appointment of the special master referred to in the District Court's Opinion, if it proves to be necessary. The cases cited in Part II of the Court's Opinion below demonstrate that the District Court's discretion in granting specific performance comports with the better and more modern decisional law.[57] In no event may it be labelled arbitrary.

III. APPELLANTS' SO-CALLED PUBLIC POLICY DEFENSE RAISED FOR THE FIRST TIME IN APPELLANTS' BRIEF COMES TOO LATE TO BE CONSIDERED ON THIS APPEAL; AND, IN ANY EVENT, IT IS WHOLLY WITHOUT MERIT

The so-called public policy issue asserted in Part III of appellants' brief is an afterthought, not raised below. In fact, there is no "public policy" issue, and the *Hazelton* decision[58] has no relevance to the facts of this case.

A. This Last-Minute Defense Should Not Be Considered By This Court.

This Court normally declines to concern itself with issues not raised or considered below. "Litigation must have an end: parties must make full use of their day in court, and not seek to overturn an adverse judgment by raising new issues on appeal."[59]

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[57] See also, cases cited, pp. 32-34, supra.

[58] Hazelton v. Sheckels, 202 U. S. 71 (1906).

[59] In re Adoption of a Minor, 94 U. S. App. D. C. 131, 214 F.2d 844, 846 (1954); cf. F. R. Civ. P. 12(h).

Even where the new issue might appear to be purely one of law, appellate courts are not hospitable to its consideration[60] except in cases of "particular" or "unusual" circumstances and "to prevent a clear miscarriage of justice."[61] Appellants suggest no "unusual" circumstances to justify their failure to think of this defense below, and it is hardly a "miscarriage of justice" that they be held to the bargain they made.

B. In Any Event, This New Point Is Essentially Frivolous.

Furthermore, this last-minute effort to have the Court apply *Hazelton* and similar decisions[62] to this case is so wide of the mark as to be almost frivolous.

We have no quarrel with the principle set forth in those cases — namely, that a contract by an agent or employee to procure favorable legislative or other governmental action for his principal on a contingent fee basis is generally unenforceable. This is because of the undue temptation or "tendency . . . to corrupt or mislead" which courts feel is inherent in this type of arrangement.[63]

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60 See, e.g., Keyes v. Madsen, 86 U. S. App. D. C. 24, 26, 179 F.2d 40, 42 (1949), cert. denied, 339 U. S. 928 (1950); United States v. Atkinson, 297 U. S. 157, 159 (1936).

61 See, e.g., Mulligan v. Andrews, 93 U. S. App. D. C. 375, 211 F.2d 28, 29 (1954); cf. In re Adoption of a Minor, supra.

62 The two other cases cited by appellants on this point are clearly inapposite. The Mississippi Valley case, 364 U. S. 520, 550, referred to the "temptation" in a conflict of interest situation, which is clearly not a factor here. And the contingent fee contract in LeJohn Mfg. Co. v. Webb, 95 U. S. App. D. C. 358, 222 F.2d 48 (1955), violated a specific public policy as set forth in an Executive Order relating to Government procurement contracts — again far different from our case.

63 See, e.g., Gesellschaft v. Brown, 64 U. S. App. D. C. 357, 78 F.2d 410, 412 (1935).

It is well established, however, that that principle does not bar enforcement of contracts to render professional or technical services, even on a contingent fee basis, as distinguished from cases where personal influence is either contemplated or used.[64]

The record is crystal clear in this case that what appellee was asked for, and gave, was essentially its professional opinion for use *by appellants* in the zoning proceeding. There is no suggestion that appellee was to use, or did use, personal influence or private contacts of any sort with the zoning officials.

Appellants would thus have this Court give *Hazelton* a breadth of application that is wholly unwarranted by either its facts or the Opinion. Unlike that case, appellee did not undertake to obtain anything for appellants from the zoning officials, and what it did undertake was wholly removed from any possible improper area.[65] Moreover, the various decisions denying enforceability, including *Hazelton* itself,[66] seem to turn upon the Court's feeling that improper methods were invited, contemplated, or used in the particular case.[67] Indeed, the relatively

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[64] Browne v. R. & R. Engineering Co., 264 F.2d 219, 222-223 (3d Cir. 1959); Stanton v. Embry, 93 U. S. 548, 556-557 (1877); cf. Restatement, Contracts, §559.

[65] Appellee's obligation was to furnish to appellants its written statement of opinion, based upon its prior independent studies, favoring appellants' position (as against a competitive tract), for appellants' use at the public hearing. In reliance on appellants' promise, appellee also made witnesses available for two hearings, and, at appellants' request, wrote a second letter confirming its previously expressed views. (See pp. 3-4,6, supra.)

To the extent that the complaint may have alleged such assistance in broader terms than was shown by the proof, it should be deemed amended to conform with the proof. Cf. F. R. Civ. P. 15(b).

[66] "In its inception, the offer, however intended, necessarily invited and tended to induce improper solicitations, and it intensified the inducement by the contingency of the reward." (202 U. S. at 79). (Emphasis added.)

[67] See 6A Corbin on Contracts (1962), §1449; cf. Luff v. Luff, 167 F.2d 643 (D. C. Cir. 1963).

limited applicability of *Hazelton* is confirmed by the Supreme Court itself in at least two later cases — *Valdes v. Larrinaga*, 233 U. S. 705 (1914), and *Steele v. Drummond*, 275 U. S. 199 (1927) — both unanimous, and one by Mr. Justice Holmes, the author of *Hazelton*.

In *Valdes*, speaking through Mr. Justice Holmes, the Supreme Court enforced a contingent-type agreement to procure a water power franchise in Puerto Rico, noting that although plaintiff was a former Puerto Rican official there was no suggestion of any illegal action.[68] Specifically distinguishing *Hazelton*, the Court pointed out that there was nothing that

> "necessarily imports, or even persuasively suggests, any improper intent or dangerous tendency . . . . [T]he things done . . . have no sinister smack." (233 U. S. at 709, 710).[69]

Clearly, there is not the slightest suggestion of any "sinister smack" in anything contemplated, promised or done by appellee in the instant case.[70]

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[68] Plaintiff there had undertaken to help defendant procure a water power franchise (including both technical help in developing the project and help in presenting the matter to the Puerto Rican government), in return for a 10% interest in the concession, if obtained.

[69] There are other features in the Valdes opinion which — far more than the Hazelton facts — are pertinent to the relationship between the parties in our case. Thus, the Court held that plaintiff had an "equitable interest" in the concession (p. 709), and made specific reference to the technical or professional aspects of plaintiff's services (p. 710).

[70] In Steele v. Drummond, the Supreme Court upheld a contract to secure municipal approval of a proposed railroad extension as not contrary to public policy, indicating that "nothing sinister or improper" was done or contemplated. (See 275 U. S. at p. 205.) The Court expressly distinguished Hazelton and similar cases as involving "personal influence, solicitation and the like or . . . other improper or corrupt means" (p. 206).

C. The Letter Of May 29, 1962 Was Not False.

Appellants' further claim, in their Part III, that the May 29th letter was false, is without merit.

There is no question but that prior to Mr. Lerner's request for help, top Lansburgh's officials had made extensive studies of the area that included Tyson's Corner for a good shopping center site (F. 1487-1488, 1495-1496, 2017-2018, 303-325); that they personally visited the two tracts in question (F. 1273, 1109); and that they made a considered choice in favor of the Lerner-Gudelsky tract as set forth in the May 29th letter (F. 425). That choice was supported by three factors mentioned in the letter — namely, location of the Lerner-Gudelsky tract on the Beltway,[71] its location on both local Routes 7 and 123,[72] and its lack of competitive automobile traffic within the center.[73] These three factors were highly pertinent to the eventual zoning decision favoring the Lerner-Gudelsky tract (see footnote references above), and their inclusion in appellee's letter added independent expert support to the arguments being made by Lerner and Gudelsky.

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[71] See F. 1640-1641. Mr. Lerner specifically mentioned this factor to the Board. (F. 2177, 2181.) Rouse did not claim visibility from the Beltway for his tract. (F. 2187.)

[72] See F. 1833-1834. The Rouse interests had claimed that their tract was the only site in the area that had acceptable access for a major regional center. (F. 2188-2189.)

[73] This was a point of serious concern in the zoning proceedings. Witnesses for Rouse argued that the interrelationship of commercial, residential and industrial traffic on their much larger tract was desirable (F. 2171-2173, 2214), while the Lerner-Gudelsky interests argued to the contrary. (F. 2183.) See F. 1832-1838, 2217.

Appellants raised the same falsity contention below, but as part of a different point — *i.e.*, that Lansburgh's help had no value. (F. 2141-2153.) This contention was necessarily rejected by the trial judge's finding that the letter was adequate consideration for the option. (Opinion, p. 15a.) There is ample support for his conclusion on that issue. (See pages 3-6 supra.)

IV. THE CLAIM IS NOT BARRED BY LACHES

Contrary to appellants' assertion (Brief, p. 59), the facts bearing on the claim of laches are not "undisputed." They were found adversely to appellants' contentions by the District Court which concluded that

> "at all material times the plaintiffs . . . officers did inform the defendants that it intended to hold them to their contract."

(Opinion, p. 33a.) The Court further found that action by appellee had to await execution of a lease with another major department store — "one of the conditions precedent to [appellants'] obligation." (Opinion, p. 34a.) This was the precise position taken by appellants in the summer of 1965 when appellee sought more speedy action. (F. 1994, 1967-1970.)

The record clearly establishes the accuracy of the District Court's finding that Lansburgh's throughout the period pressed appellants for its lease. Perhaps most critical to appellants' claim is the fact, admitted by both Mr. Lerner and Mr. Merriman, that while they repeatedly discussed the matter with appellee, at no time did appellants through the end of 1965 ever communicate to Lansburgh's that they would not give Lansburgh's an equal lease. (F. 1861-1862, 1995.)[74]

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[74] Moreover, it appears that both prior to and subsequent to the appellants' letter of May 1964 (where appellants denied on statute of frauds grounds that there was a legal obligation to Lansburgh's but did not state that a lease would be refused) appellants admitted an obligation to Lansburgh's. (F. 1239-1241, 1972-1974, 1969-1970: "Ammerman and Merriman feel that their understanding is that they first must make their deal with W and H and then with us.")

On the other side of the coin, the proof is clear that appellants did not act to their detriment because of any lack of action by Lansburgh's.[75] The letters of intent which were entered into with Woodward & Lothrop and Hecht's by their express terms were not binding. (F. 2105-1826-1828.) Mr. Lerner admitted that until the leases were actually executed in December 1965 he had no legal commitments, and that those he thereupon undertook he did on his own determination, and not because of anything Lansburgh's had done or failed to do. (F. 1825-1831.) That parties will depart from a letter of intent where necessary is clearly established by the fact that when Lansburgh's informed the department stores, in the fall of 1965, of its right to a lease, the list of approved tenants for the remaining department store site was revised to include Lansburgh's. (See pages 7-8, *supra*.)

Finally, Mr. Lerner eventually admitted that the rentals in the Woodward & Lothrop and Hecht leases were not fixed on the assumption that Sears would be a tenant (F. 1686B). On the contrary, the documentary evidence establishes that in early 1965 the rental was established on the assumption that Lansburgh's would be a tenant.[76]

Under these circumstances appellants' claim of laches is frivolous.

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[75] The record shows that the entire shopping center was in a state of flux for an extensive period after Mr. Gudelsky's death. The question of management of the project was up in the air, with the representatives of the Gudelsky estate contemplating a manager other than Mr. Lerner. It was not until the spring of 1965 that a formal partnership agreement even was concluded. (F. 1985-1991.)

[76] F. 2100. While that memorandum refers only to the minimum rent per square foot, appellants' own expert witness made clear that this minimum rent, based on the number of square feet of the store, sets the break point, after which percentage rentals will apply. (F. 1922-1924, 1926.)

Moreover, even if appellee's alleged delay were measured from the May 1964 letter, there would be no tenable claim of laches. It is universally recognized that a mere lapse of time does not constitute laches.[77] A suit may be barred on the ground of laches, or stale demand only if there is proof of (1) undue and unexplained delay by the complainant in asserting its rights in court; (2) lack of knowledge on the part of defendant that the complainant would assert the right; and (3) injury or prejudice to the defendant, in the event relief is accorded to the complainant, that would otherwise not have resulted.[78] Not one of these circumstances is present here.

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[77] E.g., Evans v. United States Fidelity and Guarantee Company, 127 A.2d 842 (D. C. Mun. App. 1956); Szuch v. Lewis, 193 F. Supp. 831 (D. C. D. C. 1960).

[78] Am. Jur. Equity, §498, pp. 343-344: see Lamb v. Patterson, 154 F.2d 319 (D. C. Cir. 1946), rev'd on other grounds, 329 U. S. 539, 67 S. Ct. 448, 91 L. Ed. 485 (1947); Branner v. Branner's Adm'r, 108 Va. 660, 62 S.E. 952 (1908); Adams v. Pugh's Adm'r, 116 Va. 797, 83 S.E. 370 (1914). In addition, conceding arguendo that the May 1964 letter was a repudiation of appellee's contractual rights, appellee filed suit within the three-year period of the Statute of Limitations for contract actions (D. C. Code, Sec. 12-301) (Supp. V, 1966), indeed, more than one year and four months prior to the expiration thereof. For this reason, too, laches is entirely inapplicable. While a court of equity is not absolutely bound to follow the analogous Statute of Limitations, the circumstances must be extraordinary indeed to justify relief on the ground of laches where a corresponding action at law would not be barred. Washington Loan and Trust Company v. Darling, 21 App. D. C. 132 (1903); Curles v. Curles, 136 F. Supp. 916, aff'd. 100 U. S. App. D. C. 43, 241 F.2d 448 (1957); Sanford v. Simms, 191 Va. 644, 66 S.E. 2d 495 (1951); Hagan Estates v. New York Min. and Mfg. Co., 184 Va. 1064, 37 S.E. 2d 75 (1946).

V. THE STATUTE OF FRAUDS PRESENTS NO BARRIER TO ENFORCEMENT OF APPELLANTS' WRITTEN PROMISE OF A LEASE

A. As A Unilateral Contract.

The main thrust of appellants' first argument concerning the Statute is that the option letter constitutes an incomplete integration of a bilateral oral contract and as such is not sufficiently complete to satisfy the Statute.[79] The argument fails because the characterization is wholly inaccurate.

The letter, as the lower court found, is more than a partial integration or note or memorandum of a prior oral, bilateral contract; it is a complete written unilateral contract stating all of the obligations of the promisors. Nothing more than that is required to satisfy completely the Statute where the consideration has been performed, and the consideration may be established by parol. *E.g., Fain v. Irvington Knitting Mills*, 166 N.Y.S. 2d 544, 6 Misc. 2d 462 (1947);[80]

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[79] The relevant part of the District of Columbia Statute of Frauds (D. C. Code 12-302) provides that an action concerning an interest in real estate may not be maintained,

> "unless the agreement upon which the action is brought, or a memorandum or note thereof, is in writing, which need not state the consideration and signed by the party charged therewith. . . ."

[80] In the Fain case the court stated:

> "It is fair to assume that lawyers and certainly laymen in dealing with a unilateral contract do not normally regard a consideration which has been fully performed or a price wholly paid as an integral part of the contract itself; they think of it rather as something already done or given in exchange for the promise and therefore no longer necessary to be in writing. It seems just to conclude that with respect to unilateral agreements the requirements of the Statute of Frauds for practical purposes are satisfied when the executory promise, if it be unqualified and unconditional, is adequately stated, although resort be necessary to parol evidence to show that the promisee has in fact done the thing or paid the price which made the contract effective and binding upon the promisor." (166 N.Y.S. 2d at 548.)

Standard Oil v. Koch, 183 N.E. 278, 260 N.Y. 150 (1932); *Potter v. Bland*, 288 P.2d 569, 136 Calif. App. 2d 125 (1955). See also, 4 *Williston on Contracts*, §571, at pages 53-54 (Jaeger Ed. 1961). The District of Columbia Statute is, of course, explicit that the consideration need not be stated in the writing.

Under such circumstances and contrary to appellants' contention, the document need not "independently, within its own four corners" establish that the parties contracted with each other. The law has long been to the contrary when the consideration has been performed, and the remaining promise signed by the party to be charged, is in writing. See, *e.g.*, *D'Wolf v. Rabaud, Bros. & Co.*, 26 U. S. (1 Pet.) 476 (1828); *Edgerton v. Mathews*, 6 East. 307, 102 Eng. Rep. 1304 (1805) (discussed at 4 *Williston on Contracts*, §571, pp. 52-53 (Jaeger Ed. 1961)); *Ledford Construction Co. v. Smith*, 231 Md. 596, 191 A.2d 587 (1963); *Potter v. Bland, supra*. The writings in each of these cases was sufficient to satisfy the Statute of Frauds although there is no indication in any of them that a contract had been made between the plaintiff and the party sought to be charged. In each case the writing contained only the promise of the party being charged and the consideration was established by parol. Professor Williston states the rule as follows:

> "Where statutes have been passed . . . expressly providing that the consideration need not be stated in the memorandum . . . it seems a reasonable construction of them to hold that where a proposed contract is unilateral, *only* the promisor's promise need be stated . . . ."
> 4 *Williston on Contracts*, §571 at 58-59 (Jaeger Ed. 1961).

In the cases relied upon by appellants the documents did not contain any words of promise or assurance *and* no other credible evidence was offered to establish the existence of the claimed contractual relationship.[51]

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[51] Sherman v. Johnson, 159 Ohio State 209, 112 N.E. 2d 326 (1953) (note signed by a decedent stating only "we want [our adopted child] to have all our property and everything we own", an expression of desire completely lacking in any words of promise); Gedvick v. Hill, 333 Mich. 689, 53 N.W. 2d 583 (1952) (the memorandum allegedly reflecting a contract was an application filed by the defendants for permission of a welfare organization to sell certain property owned by the defendants, with no words of promise, and no other credible proof indicating that the defendants had made any oral arrangement with the plaintiff or that any consideration was given in return for an oral promise); Bennett v. Mar-Tex Realization, 250 S.W. 2d 612 (Tex. Civ. App. 1952) (offer to enter into a lease was revoked before it was accepted by the offeree, and no agreement, either oral or written, that a lease upon terms to be later agreed upon would be entered into).

Appellants at page 36 of their brief, also quote apt phrases from three inapposite decisions. In Keane v. Gartrell, 118 App. D. C. 166, 334 F.2d 556 (1964), a passing reference in a letter was considered in context, gratuitous, and not an offer of guarantee which could be accepted. In Storrow v. Concord Club, 66 App. D. C. 190, 70 Fed. 852 (1934) it was clear no contract had been consummated, the writing relied upon a Club resolution, never having been delivered to plaintiff. Bellows v. Porter, 210 F.2d 429 (8th Cir. 1953) is not a Statute of Frauds case. There plaintiff sought to compel defendant to exercise a stock option ahead of its plain written terms, based on an alleged oral agreement plaintiff claimed was the consideration for the option arrangement. The court denied relief citing the parol evidence rule because the oral agreement relied upon was in "direct contradiction to the positive terms of the written agreement. . . . Of course, the actual consideration for a contract may usually be shown by parol evidence, provided, however, that such proffered evidence is not contradictory to the executory provisions contained in the contract."

B. As A "Note Or Memorandum" Of An Oral Bilateral Contract.

The trial court was correct in its characterization of the writing as a complete unilateral contract, thus, also was correct that this writing, together with proof of the performance by appellee of the consideration for the option, satisfies the Statute of Frauds. In addition, the Statute of Frauds would be satisfied even if we proceed on the assumption that the Lerner-Gudelsky letter is merely a "note or memorandum" of a prior oral bilateral contract. It is a letter containing a written promise conditioned on success in the zoning proceeding. This letter commences by expressing appreciation for assistance in the very zoning proceeding concerning the property about which the promise is made. It is signed by both partners and contains no irrelevant material. We have documentary proof of the assistance mentioned (the letter of May 29, 1962, appellants' brief, p. 41a). We also have documentary proof of the promisor's use of that assistance in the zoning proceeding and their success therein, satisfying the condition of their promise. The Court is not required to be myopic in applying the Statute of Frauds.

> "The note or memorandum that is sufficient to satisfy the requirements of the statute may be in almost any possible form. *It need not be a writing that was prepared for the purpose of stating the terms of the agreement or of evidencing the fact that it was made.*

2 *Corbin on Contracts*, §508 at p. 732. See also, *Restatement, Contracts*, §209; *Barry v. Coombe*, 1 Pet. 640, 7 L. Ed. 295 (1828).

> ". . . With ample explanation and corroboration to be found in undoubted surrounding circumstances *or even in the accompanying oral testimony*, a writing may be sufficient even though it is cryptic, abbreviated, and incomplete."
> 2 *Corbin on Contracts*, §498, pp. 683-684. (Emphasis added.)

The "note or memorandum" may be sufficient to satisfy the requirements of the statute even though it consists of several separate papers and documents, not all of which are signed by the party to be charged, and no one of which is sufficient memorandum in itself.[82] There is no reason, in law or policy, that the several documents relied upon contain any internal reference to each other.[83]

Of course, parol evidence is admissible to identify and connect the several writings relied upon.[84] These rules are particularly applicable to a memorandum of a contract consisting of letters. *Ochs v. Weil*, 79 U. S. App. D. C. 84, 142 F.2d 538 (1944); 2 *Corbin on Contracts*, §516. In such cases, a common feature is the fact that some are signed by the other party.

> "This does not prevent their sufficiency to satisfy the statute. They may be connected for this purpose, not only by direct internal references, *but also by dates and subject matter, and by oral testimony as to surrounding facts*." (Emphasis added.)

Id., Sec. 516, at p. 754; *Gall v. Brashier*, 169 F.2d 704 (10th Cir. 1948).

The evidence in this case connecting the letter written by Mr. Jagels on May 29, 1962, and delivered to the Lerner-Gudelsky interests for use in the zoning proceeding in return for the Lerner-Gudelsky written assurance of a lease, has been summarized elsewhere and need

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82 The cases so holding are legion; they are collected at 2 Corbin on Contracts, Sec. 512.

83 Id., at pp. 746-747.

84 E.g., Tampa Shipbuilding & Eng. Co. v. General Const. Co., 43 F.2d 309 (5th Cir. 1930); Crabtree v. Elizabeth Arden Sales Corp., 110 N.E. 2d 551, 305 N. Y. 48 (1953); Waters v. W. O. Wood Realty Co., 71 So. 2d 1, 260 Ala. 527 (1954); Restatement, Contracts, §208(b)(iii).

not be reviewed here. No suggestion is made that any obligation of appellee remains unperformed. The lower court believed this evidence reflected that a contract had been made. Where the trier of fact is convinced of the fact that an oral contract has been made, the proper standard for application of the Statute, in view of its purposes, if the integrity of contractual agreements is to be upheld, is to enforce the contract.[85]

C. Because Of Performance By Appellee.

Appellee cannot recover its performance of which appellants have had the full benefit. Under the circumstances found by the trial court such performance is consistent only with a contractual relationship — for department stores, including appellee, normally avoid just the action appellee took in a competitive zoning proceeding. See p. 5, *supra*. Appellee's subsequent action, at Lerner's request, opposing zoning for the Rouse tract,[86] and the fact that appellee did not seek any other store sites in the Fairfax County quadrant of Northern Virginia,[87] confirms appellee's reliance on the promise. Under *Brewood v. Cook*,

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85 "The purpose of the Statute is the prevention of successful fraud by inducing the enforcement of contracts that were never in fact made. It is not to prevent the performance or the enforcement of oral contracts that have in fact been made; it is not to create a loophole of escape for dishonest repudiators. Therefore, we should always be satisfied with 'some note or memorandum' that is adequate, when considered with the admitted facts, the surrounding circumstances, and all explanatory and corroborative and rebutting evidence, to convince the court that there is no serious possibility of consummating a fraud by enforcement. When the mind of the court has reached such a conviction as that, it neither promotes justice nor lends respect, to the statute to refuse enforcement because of informality in the memorandum or its incompleteness in detail." Corbin on Contracts, Vol. 2, Section 498, pp. 680–81.

86 See p. 6, supra.

87 F. 1962-1963, 1966, 2034-2038.

92 U. S. App. D. C. 386, 207 F.2d 439 (1953) appellants are estopped from asserting the Statute of Frauds.[88]

VI. THE LIMITED RIGHTS OF APPROVAL OF THE OTHER DEPARTMENT STORE TENANTS POSE NO BARRIER TO SPECIFIC PERFORMANCE

Appellants assert that because the Hecht Company and Woodward & Lothrop have certain rights of approval with respect to the plans of the third department store, this is somehow an impediment to entering into a lease. This is not a problem of executing a lease, which is what the District Court ordered – it is only a possible, but unlikely, problem of performing the lease.[89]

The rights of approval are in fact both very limited and specifically made subordinate to a court order. Appellants are required, under the Hecht and Woodward & Lothrop leases, to submit preliminary plans and specifications of the third department store, prepared by the landlord's architect, to Woodward & Lothrop and Hecht's for their

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[88] See also, Schanck v. Jones, 97 U. S. App. D. C. 148, 229 F.2d 31, 32 (1956); Fibreboard Products, Inc. v. Townsend, 202 F.2d 180 (9th Cir. 1953); Phillips Petroleum Co. v. Buster, 241 F.2d 178 (10th Cir.), cert. denied, 355 U. S. 816 (1957).

[89] Moreover, there is no more reason to speculate now that there will be any problem in obtaining the approval of the Hecht Company and Woodward & Lothrop than there is to speculate that Connecticut General Life Insurance, which under its letter of commitment has approval rights for the plans of everything to be built in the center, would disapprove all or some of those plans (including possibly even the Hecht Company and Woodward & Lothrop plans) (See F. 382).

approval, but such approval "shall not be unreasonably withheld."[90] Furthermore, even that limited approval is restricted to assuring compliance with the "Articles" set forth in the Woodward and Hecht's leases and "applicable" to the third store.[91]

The only such "Articles" are the general provisions in the lease concerning the characteristics and quality of the Center (see, *e.g.*, Section 8) and the limitations on the size and height of the third store (Section 39.2). Since these requirements must be complied with in any event because they are also part of appellee's lease as ordered by the Court (this ordered lease being identical with the Hecht's and Woodward leases in all such respects), this whole "approval" argument is obviously a make-weight. If appellants comply with the lease to be entered into with appellee they automatically will comply with standards which entitle them to the approval of Hecht's and Woodward & Lothrop. In far less

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[90] Section 10.2(A) of both leases (F. 2121-2122) gives certain rights of approval of "work," which includes the construction referred to in Article XXXIX (p. 125, et seq. of both leases). Article XXXIX, Sec. 39.2(A) (F. 2125) includes the construction of building A, which is the third department store. The rights of approval concerning that building are contained solely in Section 10.2(A) (F. 1900-1901). The approvals would have to be obtained regardless of which department store occupied the third site.

[91] The leases provide:

> ". . . The aforesaid right of approval of Tenant shall extend to all design, engineering and construction elements and components with respect to the Work, shall strictly comply with the respective Articles hereof applicable thereto, and shall include approval of, but not by way of limitation: [Various aspects of the store.] (F. 2122.) (Emphasis added.)

Appellants urged below that those carefully worked out leases contain a "draftsman's lapse in grammar" which includes the omission of a word and the setting off of a clause in parenthetical form — and they would now rewrite the Woodward & Lothrop and Hecht rights of approval to be more extensive than the leases now provide (F. 2154). We suggest proceeding with the leases as written.

clearly cut circumstances courts have had no hesitancy in ordering specific performance where some aspect of performance may at some time in the future require the approval by a third party not before the court.[92]

In any event, Section 10.2(A) which contains the limited rights of approval of the other stores referred to above, is expressly made "subject to the provisions of Article XXXII hereof." Article XXXII is the *force majeure* clause of the lease and expressly excuses performance of any obligation or undertaking provided in the lease as the result of a judgment or decree of judicial authority. (F. 2123-2124.) The Lansburgh's lease is being entered into under such a decree and, particularly, since the other stores were on notice of Lansburgh's claim prior to execution of their leases (F. 2123, 1948-1952), their very limited right of approval cannot be a barrier to that decree.

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92 In Watson Bros. Transp. Co. v. Jaffa, 143 F.2d 340 (8th Cir. 1944) the court, citing numerous precedents, stated:

> ". . . But a man's obligation under his lawful contract is not a whit less binding upon him because of the fact that an approval of the transaction must be had before the party to whom he has obligated himself can receive full benefits.
>
> . . .
>
> "Similarly, in the instant case, a court of equity can require that Jaffa perform that which is necessary for plaintiff to enjoy and exercise the rights acquired by him under his contract. The plaintiff is entitled, at least, to this much aid from this court. There is no reason for the court to aid a party who refuses to carry out those acts necessary to effectuate the intention and contract of the parties by speculating as to the willingness or unwillingness of the Commission to grant approval. . . ." (143 F.2d at 346-347).

CONCLUSION

The findings of the court below are not "clearly erroneous"; in fact, they are demonstrably correct. Whatever the burden of proof which appellee may have faced — whether "clear and convincing proof" or otherwise — it was more than satisfied. The option and lease are certain and specifically enforceable, and in ordering that relief the lower court properly exercised its discretion.

Judgment below should be affirmed with costs to the appellee.

Respectfully submitted,

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APPENDIX A

Because of the extent to which appellants have reargued the evidence, it is not possible at other than very great length to refute point by point where their statement errs, either directly, or by implication. Moreover, in view of the fact that the District Court clearly considered all these matters, heard the witnesses in open court, and rejected all of the various contentions which appellants are here making about the evidence, we see no reason to burden this Court with such a review. However, we do think that from an examination of appellant Lerner's testimony below, which reflects the principal factual contentions made by appellants here on appeal, it can be further demonstrated that the District Court's findings were clearly correct.[1]

1. Lerner's Explanation of Why Lansburgh's Would Act as a Volunteer (Including Wheaton Plaza and the Montgomery Ward Veto; Woodward & Lothrop's Position; and Lansburgh's Claimed Interest in Riverside Plaza).

In denying that Mr. Jagels insisted on a *quid pro quo* for his assistance, Mr. Lerner sought to explain why Lansburgh's might "volunteer" a letter favoring the Lerner-Gudelsky tract as follows:

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[1] In essence, appellants' factual presentation is as follows: (1) Because of a veto situation by other tenants at Wheaton Plaza, Lansburgh's had reason to curry favor with Messrs. Lerner and Gudelsky to get their help in overcoming the veto (appellants' brief, pp. 6, 33). (2) The promise of a lease was not given in exchange for Lansburgh's help in zoning proceedings, but was given as a nice letter to help Mr. Jagels, whose job was in jeopardy (appellants' brief, pp. 7, 11, 31, 32). Matters such as the plain meaning of the promise or the business sense of the promise, also raised by appellants, are discussed fully in the main brief (pp. 9, 25-29, supra).

> "Well, the number one objective in those days [May-early June, 1962] was to continue to make every effort to obtain consent from Montgomery Ward for a store at Wheaton Plaza. This was extremely important to Mr. Jagels and I would presume to the City Store organization also." (F. 1576.)[2]

He admitted this was just surmise (F. 1850-1851). It also is demonstrably false. The Montgomery Ward veto problem as to Wheaton Plaza did not arise until the mid-summer-early fall of 1962, over a month after the Tyson's Corner exchange of assistance for the assurance of a store lease. At the very time of the exchange, City Stores was not certain it wanted a Lansburgh's store at Wheaton Plaza, and Mr. Jagels' authorization to obtain such a store was subsequent thereto.

Lerner's own testimony has several versions. On September 13, 1966, just a month prior to the trial, Mr. Lerner admitted that he did not recall any specific discussions with Montgomery Ward prior to June 30, 1962, concerning admission of Lansburgh's into Tyson's Corner, and *did not recall whether there were such prior to June 30, 1962.* (F. 1865-1866.) (See also, Ammerman to same effect, F. 1983, 1984.) However, at the trial Mr. Lerner at various points dated it back to August 1961, and to late 1961 (F. 1867, 1691-1692, 1708-1709).

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[2] Mr. Lerner, in response to the suggestion of his counsel, also mentioned Lansburgh's possible interest in Riverside Plaza (Oxon Hill) being developed by Messrs. Lerner and Gudelsky as a reason why Mr. Jagels would do favors for them. (F. 1576-1577.) However, his own files show that he was trying to interest Lansburgh's in Riverside Plaza (Oxon Hill) and that Lansburgh's was not very interested (F. 2058, 373). He admitted at the trial that this center was not first-rate and still was in search of its major tenants (F. 1911-1912). He further mentioned the possibility of Woodward & Lothrop withdrawing their previously given consent, but, as is described below, this possibility never materialized and, in fact, Woodward & Lothrop assisted in seeking Ward's approval in November of 1962 at the time that the Ward's veto first became a problem.

Lerner's copious notes of his conversations with Mr. Jagels and others at Lansburgh's and City Stores concerning the Wheaton Plaza situation refute the suggestion that in 1961 Montgomery Ward exercised, or even had the right to exercise, a veto of Lansburgh's at Wheaton Plaza (F. 1870, 2040-2049, 397-401, 2128-2130, 1868-1869). Negotiations with Lansburgh's broke down for an extended period in late 1961 over rent and related items. (F. 2128-2130, 2047-2049, 1871.) As we shall show hereafter, from this point until the summer of 1962, City Stores interest in Wheaton Plaza was most uncertain.

The first document of record which gives any indication that Messrs. Lerner and Gudelsky did seek Montgomery Ward approval for a third department store at Wheaton Plaza is a form letter written on August 15, 1962 to all of the tenants at Wheaton Plaza, informing them that the landlords were considering certain proposed changes, including the addition of a third department store (F. 2050).[3]

The first documentary evidence of any Montgomery Ward veto was their reply of September 20, 1962 in which they stated that they thought the complex of stores was of sufficient variety to satisfy the trade without the addition of another department store. (F. 2096.) That letter, from Montgomery Ward, makes no reference whatsoever to any prior discussions. Moreover, Mr. Ammerman stated, and Mr. Lerner confirmed, that even this letter from Montgomery Ward was not really a refusal. (F. 1873-1874), quoting from Ammerman deposition, F. 1982-1983.) It was not until November, 1962, that Mr. Lerner wrote a memorandum concerning seeking Montgomery Ward's approval for a Lansburgh's store at Wheaton Plaza. That document states:

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[3] Mr. Ammerman explained that this letter was sent out "anticipating that some tenant or tenants may have some objection to a third department store coming in . . . ." (F. 1977.)

> "Mr. Amsterdam and Mr. Jagels were informed that we have contacted Montgomery Ward to obtain their permission so that Lansburgh's can open with a 130,000 sq. ft. department store. TNL expects to contact Mr. Nichols at the beginning of the week and will keep Jagels informed. If Ward's commitment is obtained we will then contact Metropolitan Life re leasing the ground." (F. 2058.)

This was followed up by a letter of November 27, 1962 from Mr. Lerner to Montgomery Ward (F. 2053-2054),[4] and Mr. Lerner conceded that this was the first written request going to Montgomery Ward and requesting approval of Lansburgh's for Wheaton Plaza (other than the August 15, 1962 form letter to all tenants). (F. 1874-1875.) It should be noted that this request was supported by a letter to Montgomery Ward from Woodward & Lothrop (F. 2060-2062) stating that the admission of Lansburgh's would benefit the center. Lerner and Ammerman conceded that Woodward & Lothrop was never a problem in terms of the admission of Lansburgh's into Wheaton Plaza. (F. 1875-1876, 1978.)

As Mr. Jagels explained the situation:

> "We had permission from Woodward and Lothrop [in 1961] to go into the Center. And we understood that they had the refusal or veto power on a third department store coming into the Center. At this particular stage of the proceedings, we had been assured by Mr. Lerner that Montgomery Ward, there was no problem along these lines, and that he would handle the situation. In other words, it wasn't until a year or so later [in 1962] that I was notified that they did have veto power." (F. 1402.)

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[4] The letter of November 27, 1962 is addressed to Mr. George Stark of Montgomery Ward. Mr. Lerner at one point claimed that the letter was written as a result of a meeting between Mr. Jagels and Mr. Stark (F. 1380-1381), whereas, the letter itself shows that Mr. Lerner had the meeting with Mr. Stark.

That chain of events also is consistent with the documentary and testimonial evidence as to the timing of City Stores interest in Wheaton Plaza for Lansburgh's. After the breakdown of negotiations as to Wheaton Plaza in October, 1961 (F. 2047-2049, 1871), City Stores' top management instructed Mr. Jagels to slow down on Wheaton Plaza and withheld their required approval of the store there. (F. 1975-1976, 1404, 1473-1475.) On March 26, 1962, in connection with the addition of a Woodward & Lothrop basement at Wheaton Plaza, Mr. Jagels wrote: "I don't think we should ask them [Woodward & Lothrop] at this point *unless we are interested in going ahead.*" (F. 376.) In mid-April 1962 Mr. Jagels sent a letter and supporting financial analysis to the then Vice President of City Stores, obviously trying to persuade City Stores' top management to authorize a Lansburgh's store at Wheaton Plaza. (F. 2118-2119.) It was only subsequent to June 4, 1962, after Mr. Newman had assumed the Presidency of City Stores, that Mr. Jagels obtained authorization again to seek a store at Wheaton Plaza. (F. 1975-1976, 1473-1475.)

Lerner denied being aware of these matters (F. 1876-1880). Documents of his authorship confirm them. In his affidavit of March 17, 1966, he stated:

> " . . . in the Spring of 1962 we were far from agreement with Lansburgh's on many of the key leasing provisions." (F. 1872.)

In the autumn of 1962, however, agreement on the basic lease provisions for Wheaton Plaza had been reached — and the timing coincides with the documents showing request for Ward approval (F. 329-330, 2058-2059, 2063-2095.)

Lerner also subsequently wrote a document confirming that he knew that in May-June, 1962, City Stores was withholding approval of Lansburgh's store in Wheaton, and his only explanation was he made a poor choice of words. (F. 1880-1881.)

Lerner admitted he wanted Lansburgh's in Wheaton Plaza (F. 1863) He claimed that Montgomery Ward was vetoing Lansburgh's as a "second-rate" store (F. 1864). When documentary proof was exhibited to him showing that from November, 1963 to September, 1964, Ward vetoed the May Company (Hecht's) at Wheaton Plaza despite extensive efforts (Lerner having stated that the May Company was not a "second-rate store"), he simply denied that the documents meant what they clearly stated (Compare F. 1905-1910, with F. 2096A.)

The District Court obviously was correct in finding his story not credible.

2. Lerner's Testimony on the Date the Option Letter Was Executed

The undated option letter contains clear internal evidence that it was signed prior to the critical Fairfax County Board of supervisors hearing of May 31, 1962. It conditions the option on "the event that we are successful with our application." Mr. Lerner admitted he knew he had been successful on May 31, 1962 (F. 1888-1889). When pressed as to how under these circumstances he could still contend that the option letter had been written on June 4, 1962, subsequent to the May 31 victory, Mr. Lerner stated that "we still had a zoning on July 18 to contend with" (F. 1889) However, the record is clear that the July 18 hearing was *pro forma*. [5] Lerner claimed that he received the wording of the option letter from Mr. Jagels (F. 1563), but on June 4, 1962, Mr. Jagels clearly thought Lerner and Gudelsky had been successful. (F. 2028-2031)

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[5] The Rouse-Reynolds interests did not appear in opposition. The Board of Supervisors requested that the May 31 testimony not be repeated. The vote was six to nothing, to grant the zoning. (F. 2159-2161, 2163.) The only matter zoning counsel was concerned with was how quickly the formal zoning action could be obtained. (F. 2127.) Moreover, as of June 4, 1962, Mr. Lerner had no idea that the Rouse-Reynolds interests would continue to seek shopping center zoning for their tract even though the Lerner-Gudelsky tract had been so zoned. (F. 1889-1890.)

Mr. Lerner's insistence at the trial that Mr. Jagels "brought" the letter to Lerner's office in Wheaton Plaza, and on June 4, 1962 (after the May 31, 1962, Board of Supervisors' hearing), and that it was signed and given to Mr. Jagels at that time (F. 1563-1564), is contradicted by his own prior testimony and affidavits as to time, place, and detail as follows: (1) affidavit dated March 17, 1966; Lerner stated that "Mr. Jagels *sent* it [the option letter] to us for signature." (F. 1853) (2) deposition of March 8; Lerner did not recall where he and Mr. Jagels discussed the undated letter and stated it could have been in either his office or Mr. Jagels' office. (F. 1853-1854, 1033-1034.) He did not recall whether he signed a document prepared by Mr. Jagels, or someone else. (F. 1034-1035.)[6]

3. Lerner's Explanation of the Promise He and Mr. Gudelsky Gave Lansburgh's

In order to escape the obvious impact of his admissions that he gave the clear assurance to Mr. Jagels without any qualification, written or oral, and that the assurance did not state what Mr. Lerner claimed he intended (F. 1646-1648, 1658-1660, 1859-1860, 1037-1038, 1044-1045), Lerner, at the trial on October 19, 1966, came forward with testimony about an alleged conversation with the late Isadore Gudelsky outside of Mr. Jagels' presence, prior to Mr. Gudelsky's signing the option letter:

> ". . . when Mr. Gudelsky came in I took him into the other room which was our conference room and showed him the letter and told him as far as I was concerned it was not a binding obligation,

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[6] His explanation that as of his deposition on March 8, 1966 he did not consider the matter serious enough to become familiar with any of the events (F. 1854-1856) is ridiculous in light of the litigation pending. Also at that time Lerner considered the matter serious enough to have gone to Hecht's and Woodward & Lothrop prior thereto seeking consent for a fourth store. (F. 1945-1947.)

> but that it was our way of showing appreciation of Mr. Jagels' vast efforts in the past and also I mentioned it to Mr. Gudelsky at that point about the conversation with Mr. Amsterdam and Mr. Gudelsky and I in connection with the discussion as to Mr. Jagels' status with the company in that it was in an undetermined position." (F. 1574-1575)

Just a month prior to this testimony, in a deposition Mr. Lerner apparently had no recollection of any such discussion. (F. 1388-1389.) The pattern of new recollections and changing recollections permeates Mr. Lerner's trial testimony.[7]

The alleged conversation between Mr. Jagels and Mr. Lerner on June 4 is in itself quite remarkable. Mr. Lerner testified that prior to June 4, 1962, Mr. Jagels had never discussed with him getting any sort of letter concerning Tyson's Corner or any promise or assurance concerning Tyson's Corner (F. 1643-1644); that he came out to Lerner's office on June 4 (which Jagels denied, F. 1448), presented the letter for signature by both Lerner and Gudelsky, and simply asked for it to be signed saying it would be helpful to him. (F. 1644-1648)

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[7] At the trial Mr. Lerner recalled that Mr. Jagels had called him on the morning of June 4, 1962, to make the appointment (F. 1563.). However, in his deposition on September 13, 1966, he could not remember whether the call was in the morning or the night before. (F. 2016.) When confronted with the conflict, his explanation was "my memory must have improved . . ." (F. 1857-1858.) Further he testified at the trial that Mr. Jagels came out to see him "late in the morning of June 4th" (F. 1563.). However, in his September 13, 1966, deposition he stated that he "couldn't recall" whether it was morning or afternoon (F. 1385, 1858.) Just to complete the pattern, there is in evidence the Lansburgh's Minutes of Divisional Merchandise Manager Meeting held June 4, 1962, from 10:00 a.m. to 11:30 a.m., and Mr. Jagels is recorded as present and the minutes reflect that he spoke on a number of matters as the meeting progressed (F. 2115-2117.) Driving time from Lansburgh's to Wheaton Plaza is at least 30 minutes. (F. 1649.)

Lerner said Mr. Gudelsky had to be called in from somewhere in Montgomery County by radio-phone and that Jagels sat around waiting for Mr. Gudelsky's signature. (F. 1645; see F. 1734.) Lerner also said that he had the document retyped "word for word" solely to obtain more copies. (F. 1386, 1563-1564, 1649-1651, 1660-1661.) Common sense would dictate that instead he would suggest to Mr. Jagels that Mr. Gudelsky's signature be dispensed with. Lerner, conceding that Mr. Gudelsky was a very busy man (F. 1661) could explain only that:

> "Mr. Jagels asked for it. He is a nice fellow. I like him a great deal. And he asked for it and I just gave it to him . . ." (F. 1662).[8]

This of course raises the question of why Mr. Lerner had this supposedly insignificant document copied at all since Mr. Jagels, according to Mr. Lerner, had brought an original and one copy. (F. 1564, 1660.) Mr. Lerner's explanation was that:

> "I just happened to have a bad habit of liking a lot of copies of everything . . ." (F. 1660-1661).

Lerner offered no explanation of why. if "word-for-word" copies were what he wanted, he did not have his secretary utilize the office duplicating machine (F. 1734-1735).[9] His former secretary did have an explanation which contradicts Mr. Lerner -- she thought she had typed from a marked-up document, and was typing a draft to show Mr. Jagels. She explained the omissions of date, initials and address on the letter by

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[8]What is also absurd is that as long as the document was being retyped, Mr. Lerner,or the secretary, would not have had it dated and properly addressed. Lerner's only explanation was that he just had it copied as it was brought in by Mr. Jagels. (F. 1563-1564, 1661.)

[9]Peculiarly enough, no one can recall what happened to all of these copies. (F. 1650-1651.) Mr. Lerner's files only show one copy, a signed carbon. (F. 2032, 1650.) Mr. Lerner was sure that Mr. Jagels was given the original, and at least one of the copies that was made (F. 1650.) The copy that Mr. Jagels forwarded to Mr. Amsterdam in New York was a copy typed in Lansburgh's offices by Mrs. McKnight, clearly indicating that Mr. Jagels had no extra copies. (F. 2030, 1932-1933, 1934-1935)

saying at Lerner's direction it "was simply typed as a draft for Mr. Jagels' approval." (F. 1718-1719, 1731-1732, 1735), an odd procedure for a thank-you note which allegedly had been prepared by Mr. Jagels.

We are not for a moment suggesting that Mrs. Himmelfarb's recollections are superior to Mr. Lerner's. She could not remember whether it was winter or summer when this occurred (F. 1747), when she started to work for Mr. Lerner (F. 1726), any of the events of any of the other occasions when Mr. Jagels or other City Stores personnel were at Wheaton Plaza, (even where she typed the minutes of a meeting, (F. 1748-1750)) or any of the other events of the day involved. (F. 1747.) Yet, she remembers details of what Lerner claimed he regarded as a most insignificant occasion) (See F. 1724, 1746-1747.)

Her recollections were self-contradictory. (Compare F. 1723, 1741, 1742, 1746.) She also admitted that she only heard a fragment of the claimed conversation and conceded her recollections were only "approximate". (F. 1746.) Finally, they were in conflict with Lerner's recollections, on substance and on detail.

She said the conversation took place in Mr. Lerner's office (which is why she allegedly was able to hear it). Lerner testified that the conversation took place in the conference room, where she could not have heard it. (Compare F. 1739, 1741, 1743 with 1574, 1646.) (Compare also F. 1730 with 1574 with respect to how long it allegedly took for Mr. Gudelsky to arrive.)

If her story were believed, and the District Court properly rejected it, she nevertheless admitted that Mr. Gudelsky was an "important" man who signed "important" papers (F. 1753), that Lerner didn't write many thank-you notes (F. 1752), and that the document was obviously important to Jagels (F. 1734, 1747). This hardly supports Mr. Lerner's claim that this was just a little thank-you note.

4. Mr. Lerner's Speculation as to Why Mr. Jagels Desired a Non-binding Document.

Mr. Lerner gave extensive testimony and affidavits as to why Jagels would want a meaningless document. He admitted none of this was communicated by Jagels and was all speculation on Lerner's part. (F. 1564-1566, 1647-1648). His claim was that Jagels was under serious pressure from his superiors, or that his employment was in jeopardy and, in substance, that he would seek a meaningless document to deceive his employers. Logically extended, he is accusing Jagels of misusing a courtesy letter against its authors, then perjuring himself in these proceedings.

Mr. Jagels' distinguished record is set forth in appellee's main brief, pp. 20-21. Mr. Jagels and Mr. Amsterdam denied that any pressure was being placed on Mr. Jagels, or that Jagels' job was in jeopardy in May or June of 1962. (F. 1269-1270, 1292-1293.) Lerner claimed that prior to one meeting at Wheaton Plaza, Mr. Amsterdam requested Mr. Gudelsky and himself to go into another room and at that point told them not to take any statements that Mr. Jagels may make as binding on the City Stores Company because "they weren't certain as to whether he would work out or not, and that look to him [Mr. Amsterdam] for final answers." (F. 1534-1535) At a later point, Lerner testified that Mr. Amsterdam said:

> "They [City Stores] didn't know just what Mr. Jagels' position would be in the firm as to how long he would be retained and whether he would be successful or not." (F. 1565-1566.)

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[10] Gustave Amsterdam, Chairman of the Board of City Stores Company, and Mr. Isidore Newman, who had been on the Executive Committee of City Stores for a number of years, and who took over the Presidency of City Stores in June of 1962, stated that they chose Mr. Jagels as an outstanding man. (F. 1291-1292, 1971.)

On cross-examination, Mr. Lerner ultimately realized just how outrageous his claim was that Mr. Amsterdam, a virtual stranger to Mr. Lerner, (F. 1882) would so compromise himself, City Stores, and Mr. Jagels' position, and he admitted that:

> "the general idea that we surmised from the conversation was that Mr. Amsterdam was interested in seeing the image improve of Lansburgh in the Washington area, that he had hired Mr. Jagels for this purpose and he hoped that it would work out." (F. 1883.)

When confronted with the conflict between this statement and his earlier testimony, Mr. Lerner said that the latter statement, "is as clear a position as I can state as to what I recall the conversation to be." (F. 1884.)[11]

Appellant Ammerman later took the stand and testified that he observed the private meeting between Mr. Amsterdam and appellant Lerner However, Mr. Ammerman's recollection differs drastically in important details from Mr. Lerner's. (Compare F. 1915-1916 with 1882. F. 1915 and 1917-1918 with 1534-1535). In any event, unhappily for appellants, minutes or notes were kept of both meetings and Mr. Ammerman is not noted as being in attendance at either meeting. (F. 2047-2049, 2128-2130).[12]

Mr. Lerner's wholly implausible story that, at his first or second meeting with the Chairman of the Board of City Stores, he was taken out of the room and treated to a private conversation in which the Chairman impugned the authority and competence of the Company's chief executive

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[11] He didn't think the conversation important enough to make any note of it, notwithstanding that he had made notes of that meeting. (F. 1885, 2047-2049.)

[12] It is also interesting to compare Mr. Ammerman's vivid memory at the trial with his deposition where he was asked when the first time he met Mr. Amsterdam was, and he testified that he thought it was prior to November of 1962, but did not believe Mr. Jagels was present the first time he met Mr. Amsterdam (the questions and answers are quoted at F. 1919-1920). The minutes of both the August 1961 meeting and the October 1961 meeting show that both Mr. Amsterdam and Mr. Jagels were present. (F. 2047, 2128.)

in the Washington area, not only undercuts Mr. Lerner's entire explanation of why he gave Mr. Jagels the option letter, but also shows the inaccuracy of his testimony of the alleged Lerner-Gudelsky conversation of June 4. Mr. Lerner claimed he recalled to Mr. Gudelsky the alleged comments made by Mr. Amsterdam as a reason why Mr. Gudelsky should sign the letter. (F. 1574-1575.) However, in view of Mr. Lerner's final explanation of what it was Mr. Amsterdam allegedly said, there would have been nothing to mention to Mr. Gudelsky.

REPLY BRIEF FOR APPELLANTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21097

H. MAX AMMERMAN, *et al.*,

Appellants,

—v.—

CITY STORES COMPANY,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 21097

H. MAX AMMERMAN, *et al.*,

Appellants,

—v.—

CITY STORES COMPANY,

Appellee.

APPELLANTS' REPLY BRIEF

PRELIMINARY STATEMENT

Contrary to City Stores' brief, the builders' contentions rest on the district court's errors of law. There is no merit in City Stores' argument that these "contentions rely upon allegations of fact contrary to the facts as found by the District Court," which "findings necessarily decided credibility questions in favor of appellee's witnesses." (CS Br. 2).[1] As the opinion itself reveals, the court did not discuss some of the more important legal issues involved, made few findings of fact, and for the most part made no choices between conflicting factual contentions.

On the other hand, City Stores avoids the district court's critical finding of fact, that the arrangement between the parties did not cover the "numerous complex details" involved, the "design, construction and price of the building."

[1] The briefs on this appeal are hereinafter referred to as follows: the builders' Main Brief as "B Br."; City Stores' Brief as "CS Br.".

and that these are "substantial terms" which the parties had left "open for future negotiation." (Op. 23a).[1a]

On that finding, the court should have dismissed the complaint. (See B Br. 40-46). It should have concluded that, as a matter of law, there is no such thing as an "Option for a Lease" of a building which the parties contemplate will be custom-built for the tenant if agreement can be reached over basic terms, including design and price of the building. Instead, the court found that it had "discretion" to compel negotiations over these substantial terms and indicated it would do so. (Op. 26a, 31a, 32a.) City Stores, however, drafted a contract which it said "leaves nothing further to be negotiated and permits immediate execution thereof." (F. 230(). To the extent this is so, the order imposes terms on the builders which the court found they had only agreed to negotiate about.

We shall first deal with City Stores' claim that the district court made critical credibility determinations and shall then show that the decision below resulted from the district court's errors of law and that those errors are the only issues which this Court must reach on this appeal.

City Stores produced no witness at the trial. Its only "live" testimony was that of three witnesses at the preliminary injunction hearing six months before the trial. Those witnesses were: (1) Mr. Amsterdam, whose testimony City Stores claims was "on the critical factual issues in this case" (CS Br. 17) but is not even cited in its counterstatement or argument (it went mainly to the impact of preliminary relief—PX-B, pp. 57-112); (2) Mrs. McKnight, whose hearsay testimony the court said would not be relied upon in his ultimate decision (see p. 6, *infra*); and

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[1a] The district court's opinions are reproduced at pp. 11a, *et seq.* of the builders' main brief.

(3) Mr. Jagels, whose testimony consisted only of assumptions, not recollections (see pp. 3-5, *infra*) and hence raised questions of its legal sufficiency, rather than credibility.

I.

A. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE PARTIES HAD ENTERED INTO A CONTRACT TO GIVE AN "OPTION FOR A LEASE."

There are three points: (1) proof of the alleged oral contract was legally insufficient; (2) the district court's finding of fact that the contract left "substantial terms open for future negotiation" (Op. 23a) means as a matter of law that the parties did not enter into a contract; (3) the undated letter does not have the meaning of an "Option for a Lease" and is not a legally sufficient memorandum, under the Statute of Frauds, of the alleged oral agreement to grant such an "option."

1. *Legal Sufficiency of Proof.*

Under the court's findings, the meaning and efficacy of the undated letter as a binding unilateral contract depends completely upon proof of the oral contract pursuant to which it was allegedly given. The court did not discuss what standard of proof was being applied,[2] but the proof of the alleged oral contract would be legally insufficient even if this were merely a suit for damages.

City Stores' brief (pp. 4, 20-24) relies upon five record excerpts to prove the alleged oral contract: First is the

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[2] City Stores' argument concerning the applicable scope of review (CS Br. 20) amounts to no more than saying that the question on appeal is: Whether the district court's finding that there was an oral contract, which finding must be based on "clear and convincing" evidence, is clearly erroneous?

testimony of Mr. Jagels, City Stores' only witness to the alleged transaction, on direct examination at the preliminary injunction hearing. That testimony (quoted in full at CS Br. 21-22) did not survive the cross-examination (set out in full at B Br. 8). City Stores' attempt (CS Br. 22) to narrow the scope of Mr. Jagels' cross-examination concessions to a failure to "recall *in haec verba* the language he and Mr. Lerner had used in their 1962 discussions" does not survive a reading of that quoted cross-examination. The same is true of the claim that this testimony "was no assumption—it was a recollection consistent with his business experience . . . . " The quoted cross-examination shows that he explicitly disavowed recollection and explicitly relied on assumption and inference.[3] Mr. Jagels may have been perfectly sincere,[4] but proof of that oral contract should require solid evidence, not assumptions. City Stores does not respond to our point (B Br. 8-9) that Mr. Jagels' assumptions are only inferences based upon still another doubtful assumption (that the May 29 and undated letters were simultaneously exchanged).

City Stores also relied upon Mr. Jagels' first deposition (CS Br. 22). There too his initial statement of the transaction did not survive the test of further examination. He admitted (F. 1218) that he did not remember where he received the undated letter but only "assumed" that he was at his office, and that he did not know the date on which

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[3] The importance of recollection in the proof of an alleged oral contract is emphasized by the fact that City Stores has given substantially different versions of that alleged oral contract, particularly with respect to what Mr. Jagels was to do for the builders. Compare Amended Complaint ¶¶ 9(g), (h), (i), (n); F. 458-461, F. 444; F. 1002, 1002B-03 with F. 1305.

[4] For proof that Mr. Jagels "has no financial interest in this litigation" (CS Br. 21) City Stores cites Mr. Jagels' testimony that he had no financial interest other than 2,400 shares of City Stores stock. (F. 1243-44).

he received the letter (F. 1218).[5] He did not recall whether the alleged oral contract resulted from a telephone or personal conversation (F. 1219-20), where Mr. Lerner was at the time of the conversation (F. 1220), or whether he received the undated letter in the mail (F. 1221-24). When asked whether the person who picked up his May 29 letter "left anything for him" at the time, he responded:

> I don't know, but I am assuming that he left me Exhibit B [the undated letter] at that time, in view of the fact that there was no address on the letter. It couldn't have arrived in the mail and I would not, of course, have given them the letter dated May 29th without having this letter in hand, so I am assuming that the same messenger that picked up my letter delivered his letter.
>
> Q. But you have no present memory of that, do you Mr. Jagels?
>
> A. No, I do not. (F. 1223).

Mr. Jagels also testified as follows:

> Q. You never told Mr. Lerner, did you, that you would not hand to him, or one of his representatives, your letter of May 29, 1962, unless, at the same time, you received a signed letter from him?
>
> A. Well, again, I do not recall the exact incident, but I would assume that that would be one of my conditions. (F. 1223-24).

When asked whether he had "any conversations with Mr. Lerner as to precisely when or where pieces of paper would be exchanged?", he answered (F. 1224):

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[5] Since the parties agree that the May 29 letter was picked up at Mr. Jagels' office by Mr. Lerner on that date, the alleged simultaneous exchange of that letter and the undated letter occurred either at Mr. Jagels' office and on that day or not at all.

A. You want me to remember?

Q. If you do remember. If you don't remember, please say so.

A. I don't remember.

This is City Stores' best evidence of the alleged transaction.

The only other evidence City Stores cites (CS Br. 23) is: (a) the deposition statements of two City Stores' officials concerning what Mr. Jagels told them four years previously about his alleged conversation with Mr. Lerner; and (b) the preliminary injunction testimony of Mrs. McKnight concerning her four-year old recollection of what she overheard Mr. Jagels saying into a telephone, at the other end of which she thinks was Mr. Lerner. We are surprised that City Stores would cite any of this testimony. When the builders' counsel advised the court of their misgivings over the procedure which City Stores wanted to follow at trial—to introduce *en masse* the pretrial temporary restraining order and preliminary injunction transcripts, the depositions taken by both parties, and all exhibits thereto—Judge Gasch assured counsel that he would not rely upon hearsay testimony (F. 1518-19). On that assurance, the builders' counsel agreed to this procedure and made their decisions concerning what portions of this material it was necessary to rebut (F. 1519). Judge Gasch does not refer to this testimony in his opinion and we think it unseemly for City Stores to suggest that, contrary to his assurances, he did rely upon it.*

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* If statements by Mr. Jagels to others in his organization are to be relied upon, the Court should take note of those he made at the time to his Washington colleague, Mr. Frankel, whom he kept closely advised concerning his relationship with the builders, and who succeeded Mr. Jagels to Lansburgh's presidency. Mr. Frankel testified on his deposition that there was no oral contract. (F. 1074-75).

City Stores' brief does not respond to our point (B Br. 13) that there is no contemporaneous document alluding to the alleged oral agreement or an option at Tysons Corner, and nothing in the corporate minutes of City Stores or Lansburgh's which mentions such a transaction or option.

There was thus virtually no evidence—to say nothing of "clear and convincing" evidence—of the oral contract found by the district court, on which the edifice of an "Option for a Lease" is built.[7] The sufficiency of the above evidence presents a question of law.

2. *The Parties Recognized the Need to Negotiate Material Terms.*

The court found that the arrangement between the parties left "substantial terms open for future negotiation" —the "design, construction and price of the building to be occupied by plaintiff" as well as the "numerous complex details" involved in negotiating an agreement on those

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[7] A careful reading of the court's opinion (Op. 13a-14a) suggests that he did not rely upon any affirmative proof that the parties entered into the alleged oral contract, but rather on his rejection of the builders' contention that Mr. Jagels wrote his May 29 letter "in order to secure defendants' help in obtaining necessary permission from other department store tenants in the Wheaton Plaza shopping center for plaintiff to become another major tenant there." (Op. 13a). The court found (Op. 13a) that Mr. Jagels had no such concern over Montgomery Ward's attitude towards Lansburgh's until November, 1962, inexplicably overlooking Mr. Jagels' own testimony showing that at the time he wrote his letter he had the same concern over the other major tenant at Wheaton Plaza, Woodward & Lothrop (F. 1402-05). Furthermore, as we pointed out in our brief (p. 33) Mr. Jagels himself said he had that concern over Montgomery Ward sometime before July 25, 1962. Indeed, examination of his testimony strongly suggests that there had been an indication of Montgomery Ward's refusal well before that time. (F. 1400; with which see F. 1210). Furthermore, the builders contended and the record shows that Mr. Jagels had several other good and sufficient reasons to write such a letter (B Br. 6, 33).

terms. (Op. 23a)[6] That finding squarely raises the question of law: Did the district court err in holding that "the rule that where material terms remain to be decided by the parties, there is no contract at all . . . has no applicability to options."[7] (Op. 18a-19a.)[8]

City Stores' case that such an "Option for a Lease" was nonetheless given is based on the undated letter's reference to "equal" "rental and terms." Its position is that by this means the parties reached a meeting of minds on all the material terms of the construction contract and lease, including building design, price, and all the complex details involved in the construction of a tailor-made multi-million dollar building.[9] That contention contradicts the court's finding that these substantial terms had been left

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[6] The builders advised the court that the only form of order which was consistent with that finding was one which ordered the parties to negotiate these substantial terms (F. 2135). This, we assume, is the basis of the statement in the district court's Supplemental Memorandum that

> "The defendants would prefer the Court to order instead that they merely *negotiate* the terms of a lease with the plaintiff. However, as the Court's Opinion made clear, the defendants contracted with plaintiff for a lease, and the Court will Order specific performance of that contract." (Supp. Op. 38a).

[7] City Stores cites several cases (CS Br. 32) for the proposition that even an indefinite contract will be enforced if one party has performed. None of the cited cases involved specific performance.

[8] City Stores' claim (CS Br. 34) that it is "proper" to refer to another contract as the standard of performance begs the question. Propriety depends on whether such reference succeeds in supplying definitive standards. Thus, in *Hazeltine Corp.* v. *Zenith Radio Corp.*, 100 F.2d 10 (7th Cir. 1938), on which City Stores relies, the option referred to a "standard form contract." In contrast, reference to terms equal to those in the Hecht lease, which is not a standard form, clarifies nothing since, as the district court found, a great deal has been left unsettled notwithstanding such reference. Furthermore, as the court recognized (Supp. Op. 39a), department store buildings differ in their exterior and interior designs. "Equality" provides no standard for measuring such differences.

open for future negotiation. It also contradicts the conception which City Stores had of its arrangement with the builders up to the date of the Complaint.[11]

3. *The Meaning of the Undated Letter; Statute of Frauds.*

Contrary to City Stores' brief, the correctness of the court's finding that the undated letter was a sufficient writing under the Statute of Frauds depends on whether the letter unambiguously shows (a) that it is a unilateral contract and (b) that the assurance it contains necessarily has the meaning of an "Option for a Lease."[12] There would have been no need to posit a prior oral agreement to grant a promise of an option in exchange for the May 29 letter if the letter was unambiguous in these respects. It is the oral agreement, therefore, on which the rights of the parties depend, and which therefore must be evidenced by a document. If the undated letter's ambiguities must be resolved by reference to a prior oral contract, then the undated letter cannot be a sufficient memorandum of

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[11] Until this suit was filed, City Stores viewed its claimed legal right as one to compel negotiations over a construction contract and lease (Exhibits E, G, J, N and O to the Complaint. F. 432, 434-36, 2308). The first reference in any document to an "Option for a Lease" is in the Complaint (F. 459).

[12] City Stores, conceding that the phrase "opportunity to become a tenant" does not convey the meaning of "option" (CS Br. 28-29), claims that the "assurance" of such an opportunity unambiguously transforms a chance into a legal option. But the term or idea of assurance can be placed before many of the examples of "opportunity" cited to the District Court (Defendants' Oct. 14, 1966 Memorandum, pp. 6-9) without transforming the notion of "chance" into an "option." This is true of paragraph 9(n) of City Stores' own Amended Complaint. (See B Br. 39) In any event, the district court did not accept City Stores' contention that the document was an option on its face. The court, first finding that there had been an oral contract to give an option, found the undated letter to be an option "on the evidence." (Op. 18a)

that oral contract under the Statute of Frauds. Thus, the first section of City Stores' Statute of Frauds argument treating the undated letter as a unilateral contract (CS Br. 34-56) begs the question, since it has not been found possible to show that the undated letter *is* a unilateral contract without first positing the prior oral contract.

City Stores contends (CS Br. 59) that "the proper standard for application of the Statute" in a case in which a court finds an oral contract based on parol testimony "is to enforce the contract." That contention would nullify the Statute of Frauds. On the contrary, the Statute is premised on misgivings over parol testimony as proof of the transactions to which the Statute applies. It therefore requires those alleging oral contracts to produce documentary proof unequivocally pointing to the existence of a contract.[13]

City Stores alleges part performance to avoid the Statute, but part performance must be unequivocal, "referable solely to the contract." *Winslow* v. *Baltimore & Ohio R. Co.*, 188 U.S. 646, 658 (1903).[14] Here, City Stores' conduct does not require the postulate of a prior oral contract.[15]

City Stores' claim that in reliance upon the alleged option it "did not seek any other store sites in the Fairfax County quadrant of Northern Virginia" (CS Br. 59) was not accepted by the district court. It is refuted by the facts that: (1) Mr. Jagels did inquire about a store site at Reston in Fairfax County (F. 2309, 2310); (2) as the court

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[13] The doctrine is well established. It is stated, for example, in each of the authorities cited by City Stores at p. 58 of its brief. See also *Fraley* v. *Null*, 244 Md. 567, 224 A.2d 448 (1966).

[14] Accord, *Patton* v. *Patton*, 201 Va. 705, 112 S.E.2d 849 (1960); *Pocius* v. *Flock*, 13 Ill.2d 420, 150 N.E.2d 106 (1958).

[15] See B Br. 33, *supra*.

found, City Stores did not decide to exercise its option until it examined the terms of the Hecht and Woodward leases in the course of the trial (Op. 35a) (a 5¢ per square foot rental difference was enough to cause an impasse in the Wheaton Plaza negotiations (F. 2311-12)); (3) in November 1962 City Stores was advised that the builders planned a four-store center at Tysons Corner ("We would want to think about that" said Mr. Frankel, Lansburgh's President (F. 1080); see also B Br. 62-63); and (4) City Stores considered Tysons Corner to be "premature" even in 1964. (F. 2313).

B. THE FALSITY OF THE MAY 29 LETTER, WRITTEN TO INFLUENCE THE DECISION OF THE FAIRFAX COUNTY BOARD, PRECLUDES EQUITABLE RELIEF.

City Stores incorrectly asserts (CS Br. 46) that the issue posed by the falsity of City Stores' May 29 letter was not raised below (F. 2141-44; 2314; 2315), but correctly asserts that the case of *Hazelton* v. *Sheckles*, 202 U.S. 71 (1906) was not cited to the district court.[16]

City Stores says the letter was not false, claiming that the evidence shows "that they [top Lansburgh's officials] personally visited the two tracts in question." (CS Br. 50). These "personal visits" are irrelevant, since Mr. Jagels admitted that in writing the May 29 letter he relied rather

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[16] City Stores attempts to avoid *Hazelton* by saying that there is no suggestion that City Stores was to use, or did use, personal influence or private contacts or any other improper means to influence the Fairfax County Board in a zoning proceeding. The May 29 letter, being false, was such an improper means. Moreover, before City Stores limited the claimed consideration to that letter, it had claimed that its "assistance" in the zoning proceedings was "extensive and important" (Amended Complaint ¶ 9(i); F. 459). As the Court said in *Hazelton*:

> "The court will not inquire what was done. If that should be improper, it probably would be hidden, and would not appear." 202 U.S. at 79.

on the views of Mr. Neugass (B Br. 56-57). Indeed, when Mr. Jagels was asked on his deposition to give particulars about the "personal visits" to which he had testified at the preliminary injunction hearing, he said, in language closely tracking the contents of his May 29 letter:

> "Well, my *understanding from Mr. Neugass generally* was that the Gudelsky-Lerner tract was more centrally located from access and every other angle, and the Rouse property was across the street and the Rouse property included developments of office buildings and apartment buildings, as well, and this was the better location. At this point I can't go into all the details that you ask me." (F. 1435)

As we have pointed out (B Br. 57), Mr. Neugass testified that he had never studied the Rouse-Reynolds tract, on Mr. Jagels' own instructions. It necessarily follows that Mr. Jagels' May 29 letter was an attempt to mislead the Fairfax County Board and the builders into a belief that Lansburgh's preference for the builders' tract was a "considered choice" by an "independent expert" (CS Br. 50).

C. THE DISTRICT COURT SHOULD HAVE DISMISSED THE COMPLAINT BECAUSE OF CITY STORES' LACHES.

City Stores states (CS Br. 51) that the facts bearing on laches were found adversely to our contentions because the district court found that "at all material times the plaintiff through its officers did inform the defendants that it intended to hold them to their contract." (Op. 33a). The district court did not discuss the appropriate legal standards, and there is no way of knowing what were "all material times." We do not know whether this includes the period between the builders' rejection of City Stores' legal claim and the date, almost a year later, when they executed the

letters of intent with Hecht Company and Woodward & Lothrop. (B. Br. 16-17, 60)

City Stores does not respond to the authorities we cited which establish that the district court committed two errors of law which controlled his findings of fact (B. Br. 61-64).[17]

City Stores says that the builders' May 29, 1964 letter was based solely on the Statute of Frauds (CS Br. 51, n. 74), but the letter explicitly denied the claimed obligation "in fact" as well "as a matter of law" (F. 430). City Stores' officials at the time viewed the letter in that light (F. 1093-94). The claim that in July, 1965, the builders "admitted an obligation to Lansburgh's" (CS Br. 51, n. 74) is as untrue (F. 1967; 2308) as it is irrelevant, since the builders' claim of laches is based on City Stores' failure to sue before letters of intent were signed with Hecht and Woodward & Lothrop in late April, 1965.[18]

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[17] Contrary to City Stores' contention (CS Br. 53), only "ordinary prejudice" need be shown, even when a suit in equity is brought within the statute of limitations. See, *e.g.*, *King* v. *Richardson*, 136 F.2d 849 (4th Cir. 1943); *David* v. *Stone*, 236 F. Supp. 553 (D.D.C. 1964). City Stores contends that the relevant event for the purpose of laches is the refusal for all time to come to "give Lansburgh's an equal lease" (CS Br. 51). This contention is irrelevant since the case involves an alleged *obligation* to give a lease. The builders have no reason to "refuse" Lansburgh's or anyone else a lease.

[18] The mutual willingness of the builders and the two stores to change the letter of intent to meet Lansburgh's threat of litigation (CS Br. 52) in no way proves that the builders could unilaterally have demanded changes in those letters without seriously prejudicing their economic position (B Br. 60, n. *).

We must also note City Stores' contention that Mr. Lerner "eventually admitted" that the rental fixed in the letter of intent was not based on Sears being a tenant (CS Br. 52). For proof, City Stores cites its own counsel's mistake, corrected by Mr. Lerner, that Mr. Lerner had so testified on his direct examination (F. 1686B).

City Stores says that in January 1965 the builders contemplated Lansburgh's as a possible tenant, and contends that this disproves the builders' claim of prejudice, which was based on Lansburgh's

D. THE REQUIRED PERFORMANCE IS NEITHER CERTAIN NOR "EQUAL" TO THE HECHT CONTRACT.

Contrary to City Stores' claims (CS Br. 37), pure questions of law are raised by the district court's findings (a) that the contract which the builders are ordered to perform is "equal" to the builders' contract with the Hecht Company, and (b) that its terms are sufficiently certain to be enforceable by citation for contempt.

The contract attached to the court's order purportedly results from applying the "equal" standard of the undated letter (CS Br. 44) to fix the "substantial terms" which the court found the parties had left for future negotiation (Op. 23a).[7] If so, the court has written a contract for the parties.

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delay in asserting its claim before the builders fixed the rent formula by signing the letters of intent with Hecht Company and Woodward & Lothrop in April 1965. This contention assumes that the builders considered themselves under a legal obligation to charge Lansburgh's the same rental as the Hecht Co., which begs the whole question.

[7] City Stores makes no attempt to rehabilitate any of the cases cited by the district court and distinguished at length at B Br. 75-78.

Each of the seven cases now relied upon by City Stores (CS Br. 33) to support the propriety of the court's order involves ascertainable standards of performance, except one in which specific performance was neither requested, discussed nor granted. *Air Technology Corp.* v. *General Electric Co.*, 347 Mass. 613, 199 N.E.2d 538 (1964). In five of these cases there were no problems of uncertainty such as those raised by the court's order below. *Daniel* v. *Kensington Homes, Inc.*, 232 Md. 1, 192 A.2d 114 (1963) (develop lots in compliance with precise requirements of the FHA, VA and County, all "perfectly ascertainable by reference to the requirements of the the named agencies or of the county"); *Fletcher* v. *James Drug Stores*, 1 N.J. Super. 138, 62 A.2d 383 (1948), (permit drug store to remain member of Co-operative Trade Corp. and automatically benefit from joint purchasing and advertising); *Armstrong* v. *Southern Production Co.*, 182 F.2d 238 (5th Cir. 1950), (pay share of estimated drilling costs, readily determined "under standards prevailing in the drilling industry"); *Phillips Petroleum Co.* v. *Buster*, 241 F.2d 178 (10th Cir. 1957)

Most of City Stores' brief on this aspect of the case is a claim that the order is the same as the Hecht contract except for a few "details" (See *e.g.*, CS Br. 11, 34-35, 44). But what is missing is the very essence of the agreement: the kind of building the builders are to erect and the tenant is to accept.

The district court recognized that each of the three major stores at Tysons Corner will have a completely different exterior and interior (Supp. Op. 39a, 40a). The record shows that department stores differ in types of customers and lines of goods and services provided, and that these differences control the design and internal arrangement of their buildings—*e.g.*, the size, location and type of restaurant, the size and layout of particular departments, on which depend the number and spacing of supporting col-

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(supply sufficient gas to run particular well at reasonable price, where numerous similar agreements existed in the area); *Williams* v. *Cow Gulch Oil Co.*, 270 Fed. 9 (8th Cir. 1921) (choose from a tract *any* 640 acres having the "probable average value" of the remaining acres).

City Stores principally relies on *Barnes* v. *Sind*, 223 F.Supp. 572 (D. Md. 1963), *rev'd*, 341 F.2d 676 (4th Cir. 1965) (suit by a Negro to enforce contract to obtain housing in a white suburban development). City Stores asserts that the case involved a contract provision requiring conveyance of "a substantially equivalent house" (CS Br. 33), but in fact the provision dealt with a house "*identical*" to one of defendants' standard housing development models on an "equivalent lot" in that subdivision. Comparing only objective elements of lot sizes and numbers of trees, the court found an "equivalent" lot. Contrary to City Stores' claim (CS Br. 33) that the Court of Appeals accepted the district court's reasoning, that Court in fact reversed without discussing the question of uncertainty of terms. 341 F.2d at 680.

Hence, neither City Stores nor the district court have been able to produce any precedent for an order as uncertain as the one entered below.

In *Moon Motor Car Co.* v. *Moon Motor Car, Inc.*, 29 F.2d 3 (2d Cir. 1928) (CS Br. 32) it was a simple matter to determine whether an obligation to purchase 900 cars had been performed.

umns, permanent partitions, and the size, number and location of escalators, elevators and stairways, and special structural requirements for the space allotted to heavier goods (F. 1764-66; 1804-07, 1812, 1814-1816). The builder has a vital stake in these details of design and construction —first because they determine his construction costs, and second, because the proper functioning of each store in the center determines his percentage rentals (B Br. 60, n. **[39]; F. 1762-63, 1766, 1784, 1819).

Yet, in the "contract" attached to the order there is no rendering of the external aspect of the store (Exhibit J), but only a procedure for imposing one on the builders (unless they can prove that what City Stores has supplied does not comply with a hopelessly vague and subjective "functionally and aesthetically equal" standard). There are no drawings like those which the Hecht Company supplied before the Hecht contract was executed (DX-R), which enabled the builders to know what to put inside this 160,000 square feet of building, and what the costs would be (F. 1782, 1784, 1793, 1796-97, 1819).

City Stores' brief does not explain how the Lansburgh's building may be derived from the "precise" and "specific" standards City Stores claims to see in the court's order (e.g., CS Br. 40, 42, 44, 45). It says (CS Br. 45) the building may be derived from Exhibit D (F. 150-206), which is basically a list of standards for materials and construction and some dimensions. But (1) a great variety of buildings can be built consistent with that Exhibit (Op. 32a; Supp. Op. 39a; F. 1790, 1797), and (2) the feature which City Stores demands in its building—an underground first floor

[39] The profitability of a department store depends, in part, on how well suited its building is to its particular pattern of merchandising (F. 1765).

—precludes following Exhibit D (B Br. 69-70).[21] City Stores also relies on the "equal cost to the Hecht building" standard (CS Br. 39; Supp. Op. 39a). But (1) there is no such standard in the court's order[22] and (2) even were such a cost standard applicable, the possible designs are infinite, and the order provides no procedure by which the plans for such a building can come into existence without negotiation between the parties and settlement over detailed cost estimates. The uncontradicted architectural testimony is that negotiation and consultation between the builders' architect and the tenant's store-planning consultant is necessary. (F. 1813-15).

City Stores' brief does not analyze and prove that the standards imposed are precise enough to solve the basic problem of how an acceptable building is supposed to come into existence. The cases cited by the builders (B Br. 71-72) uniformly refuse enforcement of contracts to construct commercial buildings where the design of the building was unsettled. City Stores' brief (CS Br. 36) does not respond to this aspect of *Besinger* v. *National Tea Co.*,

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[21] City Stores takes liberties with the record in attempting to discredit the testimony of one of the builders' architectural witnesses who said that Exhibit D could not be followed for such a store (F. 1813). It indicates that this architect's testimony should be given no weight because, according to City Stores, he also testified that "he was not competent to design or make the drawings of a department store." (CS Br. p. 41). This alleged admission of personal incompetence turns out to be his testimony that, since department stores are built to suit the particular tenant, his architectural firm could not design a store building without reference to the views and instructions of the particular tenant's store-planning consultant (F. 1813-14).

[22] The court accepted City Stores' contention (CS Br. 38-39) that the Hecht Company drawings (DX-R) are not part of the builders' contract with the Hecht Company because they were not referenced therein. (Supp. Op. 39a). The same reasoning would exclude the cost limitations which are also not to be found in the proposed Lansburgh's contract.

73 Ill. App.2d 395, 221 N.E.2d 156 (1966) and *Saxon Theater Corp. v. Sage*, 347 Mass. 662, 200 N.E.2d 241 (1964) (discussed at B Br. 45-46) and does not discuss the other cases. In *Besinger*, the fact that "the design of the building" was undetermined, as it is here, was one barrier to specific performance. In *Saxon*, even damages were denied, in part because "the basic plans and specifications" were not agreed upon, as they are not here.

City Stores argues in effect that the builders are estopped from denying that the order provides "precise standards," because what they are ordered to perform is allegedly the same as the Hecht contract (CS Br. 43-45). This begs the whole question. No court has held that the Hecht contract contains sufficiently precise standards to be specifically enforceable. Only damages may be available for its breach. This also disposes of City Stores' several contentions based on the similarity of the Order's "equal" standard to certain "equal" or "most favored nation" clauses in other contracts to which the builders are a party (CS Br. 34 n. 39). These contentions amount to no more than an assertion that if a provision is in a contract it must be specifically enforceable.

E. THE DISTRICT COURT ERRED IN ENTERING AN ORDER WHICH MAY FORCE THE BUILDERS TO BREACH OUTSTANDING CONTRACTS WITH THE HECHT COMPANY AND WOODWARD & LOTHROP.

The district court did not discuss this issue. City Stores argues (CS Br. 60-61) that the standards governing those stores' rights of approval are very limited, but its argument misquotes the applicable contract provision.[23] Even so, the

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[23] City Stores omits from the lease provision, which it purportedly set out in full (CS Br. 61 n. 91) the words "the respec-

practical point is that the third store plans must still be submitted to the Hecht Company and Woodward & Lothrop for their approval, and the contracts provide no effective time limitation on the exercise of such rights of approval. (PX-F, pp. 47, 113). If approval is even delayed, the builders will be unable to comply with the building schedule imposed by the court's order (F. 202-206).[24]

City Stores argues (CS Br. 61) that if the Lansburgh's store complies with the Lansburgh's contract (in Lansburgh's judgment) such approval must automatically follow. But Hecht and Woodward & Lothrop insisted upon exercising their own judgment in this respect.

City Stores argues (CS Br. 62) that the builders may ignore the contract rights of Woodward & Lothrop and the Hecht Co. under the *force majeure* provision of their contracts (PX-F, pp. 116-17), but that would be true only if the district court's order directed the builders not to

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tive criteria, standards, and requirements set forth in" which immediately precedes the phrase "the respective Articles." City Stores makes this omission in the very act of trying to disprove the builders' contention that the lease draftsmen omitted the word "which" before the term "shall strictly comply." The builders contend that the department stores' intent was that the limitation applied to the standards of construction ("the Work"), not the standards governing the tenants' rights of approval. Even accepting City Stores' argument that the limitation applies to the right of approval, this would only mean that such right had to be consistent with, not limited to, "the respective criteria, standards and requirements set forth in the respective Articles" of the contract. Furthermore, even under City Stores' contentions, Woodward & Lothrop and the Hecht Company are entitled to enforce, by withholding approval, strict compliance with the "most favored nation" clause (PX-F, p. 113) which reaches every element of store design and construction.

[24] The cases cited at B Br. 79 are not discussed by City Stores. The only case it does cite (CS Br. 62) is irrelevant. *Watson Bros. Transp. Co.* v. *Jaffa*, 143 F.2d 340 (8th Cir. 1944). There, disapproval by the third party (the ICC) would have terminated the defendant's obligation to perform.

submit the plans for the Lansburgh's store to these other tenants for their approval."[9]

II.

City Stores makes numerous other contentions which rely upon facts not found by the district court. Space limitations permit a response only to those regarding: (a) the date of the undated letter, and (b) the plausibility of the contract.

A. DATE OF UNDATED LETTER.

City Stores claims (CS Br. A-10) that the district court rejected Mrs. Himmelfarb's testimony, which showed that the undated letter was typed and delivered at Wheaton Plaza on June 4, 1962, rather than in a simultaneous exchange for the May 29th letter on May 29, 1962 (B Br. 31-32). Since the delivery of the undated letter on any date other than May 29 destroys the basis for Mr. Jagels' assumption of an oral contract (see B Br. 8-9, 31), the court's finding that the letter was delivered "on or about May 29, 1962" (Op. 14a) is not a rejection of Mrs. Himmelfarb's testimony. Furthermore, had the court rejected her testimony, there would have been no need to discuss the "past consideration" issue (Op. 17a-18a).

City Stores claims that the undated letter's phrase "in the event we are successful" could only have referred to the May 31, 1962 proceeding (CS Br. 24). That claim is refuted by City Stores' own contentions that the July 25,

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[9] City Stores also argues (CS Br. 60) that the right of approval problem is not one "of executing a lease, which is what the District Court ordered—it is only a possible, but unlikely, problem of *performing* the lease." But elsewhere, City Stores treats the order as requiring performance of the contract (CS Br. 37), as did the district court (Supp. Op. 38a, 40a; F. 1-2).

1962 proceeding, which resulted in the denial of the rival Rouse-Reynolds zoning application, was of vital importance to the builders. (See, *e.g.*, Amended Complaint ¶¶9(n), 24; see also note 3 *supra.*)

B. PLAUSIBILITY OF THE CONTRACT.

The legal insufficiency of City Stores' proof is emphasized by its attempt to put a commercially plausible cast on this unlikely transaction (CS Br. 5-6, 25-26). It claims that writing the May 29 letter was such risky business[26] that City Stores would not have done it, save for a legally binding "Option for a Lease" in return. Yet, readily available counsel were not consulted at any step, not even to pass on the legal sufficiency of the undated letter as an option prior to surrender of the May 29 letter,[27] even though, Mr. Jagels testified, he "would not, of course, have given them the letter dated May 29th without having this [undated] letter in hand . . . ." (F. 1223). As to the builders' side of the alleged transaction, City Stores claims (CS Br. 5) that they were so desperate to overturn the

[26] The claimed risk is that the successful applicant would out of pique decline to enter into a favorable financial relationship with a department store which had expressed a preference for his unsuccessful rival, which seems implausible on its face. Indeed, City Stores subsequently dealt with Rouse on another department store branch. (F. 1147-48). It is also claimed that the department stores were reluctant to take sides between these two adjacent tracts (Br. p. 7). The record does not show "reluctance," but only that they had no basis for preferring either over the other (F. 1327), and, in fact, regarded both as equally acceptable.

[27] The General Counsel of City Stores Company did not even see the undated letter until 1964 (B Br. 11-12), and when City Stores' Chairman of the Board—a lawyer with considerable business and real estate experience (F. 2316-2320)—saw the undated letter, shortly after June 4, 1962, his only response to Mr. Jagels was: "I think you are in an interesting, perhaps even advantageous, position." (B Br. Appendix H)

Planning Commission's recommendation favoring the rival tract that they would deliver a preemptive right of unspecified duration to Lansburgh's, notwithstanding the low esteem in which that store was held by shopping center developers (F. 1339).

The contemporaneous documents do not square with City Stores' picture of the builders as men in despair (F. 2321-27). On the contrary, the record shows that the builders believed that only the County Board's views really mattered. (*Ibid.*; F. 1026). Even more important, a favorable outcome of the zoning proceedings would make the builders liable to the landowners for over $3,000,000 regardless of whether the necessary major store tenants could be found.[28] (F. 2328, 2329; B Br. 25-26).

Faced with that liability, the builders would not have risked their ability to build the center in exchange for a letter they did not deem useful enough to introduce into evidence (F. 1581).[29]

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[28] The testimony of Mr. Jagels shows that but a few weeks later (if not at the same time) the builders knew they risked loss of Montgomery Ward as a prospective tenant at Tysons Corner if Lansburgh's was to be there. (See note 7 supra). Mr. Jagels also testified that Lansburgh's was not even considered by the developers of Landmark Shopping Center, in which Mr. Jagels was very interested (F. 1430-31).

As proof that an unlimited "option for a lease" to Lansburgh's would not have jeopardized the builders' ability to find tenants, City Stores points to the Hecht and Woodward & Lothrop leases, which allow the builders to negotiate with Lansburgh's (CS Br. 9, 25). But plausibility must be judged as of the time of the alleged transaction, not three and a half years later. The record shows, in any event, that it was not until late 1965 (when City Stores sent letters threatening those stores with litigation), that those stores amended the documents to permit a Lansburgh's store (F. 1056).

[29] The Lansburgh's letter came into the zoning proceeding only to rebut a statement made by Mr. Rouse on May 31, which statement could hardly have been predicted on May 29 (F. 526-527; See also CS Br. 26-27).

It is more plausible that the undated letter was written after the May 31 hearing and is what it purports to be—an expression of appreciation for Mr. Jagels' attempt to be helpful in the zoning proceeding,[30] and an expression of the builders' intent to keep the future decision on Lansburgh's at Tysons Corner in their own hands,[31] and not to charge Lansburgh's a rent premium.[32]

City Stores contends that, according to the builders, the undated letter is "meaningless" and "insignificant" (e.g., CS Br. A-9, A-11). The builders have not so contended. Rather, their contention is that the document, like the formally executed letters of intent (F. 402; B Br. 45a-52a) was not meant to be legally binding.[33] Indeed, Mr. New-

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[30] City Stores quotes a transcript excerpt which reports Mr. Lerner's appreciation of Mr. Jagels' "vast" efforts (CS Br. A-8). Plainly, Mr. Lerner said that he was appreciative of Mr. Jagels "past" efforts. There are many such obvious uncorrected errors in the transcript which should not be seized upon—for example, the reporting of a concession by City Stores' counsel that "a cursory examination of Plaintiff's Exhibit 5 [the undated letter] leaves in doubt what the document is all about." (PX-B, pp. 9-10).

[31] Note the document recording City Stores' view that "the future of Lansburgh's in Washington was not necessarily in Lansburgh's hands since they had been shut out of at least two other shopping center developments because of their reputation or lack of it." (F. 372)

[32] This shows City Stores' error (CS Br. 27) in attributing to Mr. Lerner an admission that the interpretation of the letter to which he had allegedly testified was not in accord with the terms of the letter. His testimony that there was a difference between "the assurance of an opportunity to negotiate" and "the assurance of an opportunity to become a major department store in the center, with rental and terms, et cetera" reflects the importance he attached to the "rental" language (F. 1658-59).

[33] There are two other documents in the record bearing the same double signature of Mr. Gudelsky and Mr. Lerner (PX-A, F. 402), written at about the same time as the undated letter, which refute City Stores' argument that the double signature alone "is virtually conclusive evidence in itself that the document was deliberately intended to be both meaningful and binding upon the signatories."

man, who became City Stores' President in May 1962, testified on his deposition: "It never occurred to us that this was a legal matter" (F. 1356, 2330).

Respectfully submitted,

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DATED: September 11, 1967

(CS Br. 24). City Stores' brief mischaracterizes both documents. Nothing in the record references cited justifies its assertion that PX-A was written "for formal submission to the Fairfax County authorities." (CS Br. 24). Contrary to City Stores' claim (*ibid.*), F. 402 shows on its face that it is not legally binding.

Certificate of Service

I, MELVIN SPAETH, a member of the bar of this court, hereby certify that a typewritten copy of the foregoing Reply Brief for Appellants was served upon counsel for Appellee this 11th day of September, 1967, by mailing a copy thereof, by first class mail, with postage prepaid, to Robert Martin, Esq., in care of Leva, Hawes, Symington, Martin & Oppenheimer, 815 Connecticut Avenue, N.W., Washington, D.C. 20006, and that a typewritten copy of the Reply Brief for Appellants has been placed in the hands of Record Press, 95 Morton Street, New York, New York, for reproduction as the printed brief, which will be filed herein by September 13, 1967. No changes in the brief to be filed in printed form will be made, except for minor changes or corrections.

MELVIN SPAETH